Indiana Law Review

Volume 23 No. 4 1990

ARTICLES

The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid
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NOTES

The Proper Scope of Claimant Coverage Under the Indiana Medical Malpractice Act

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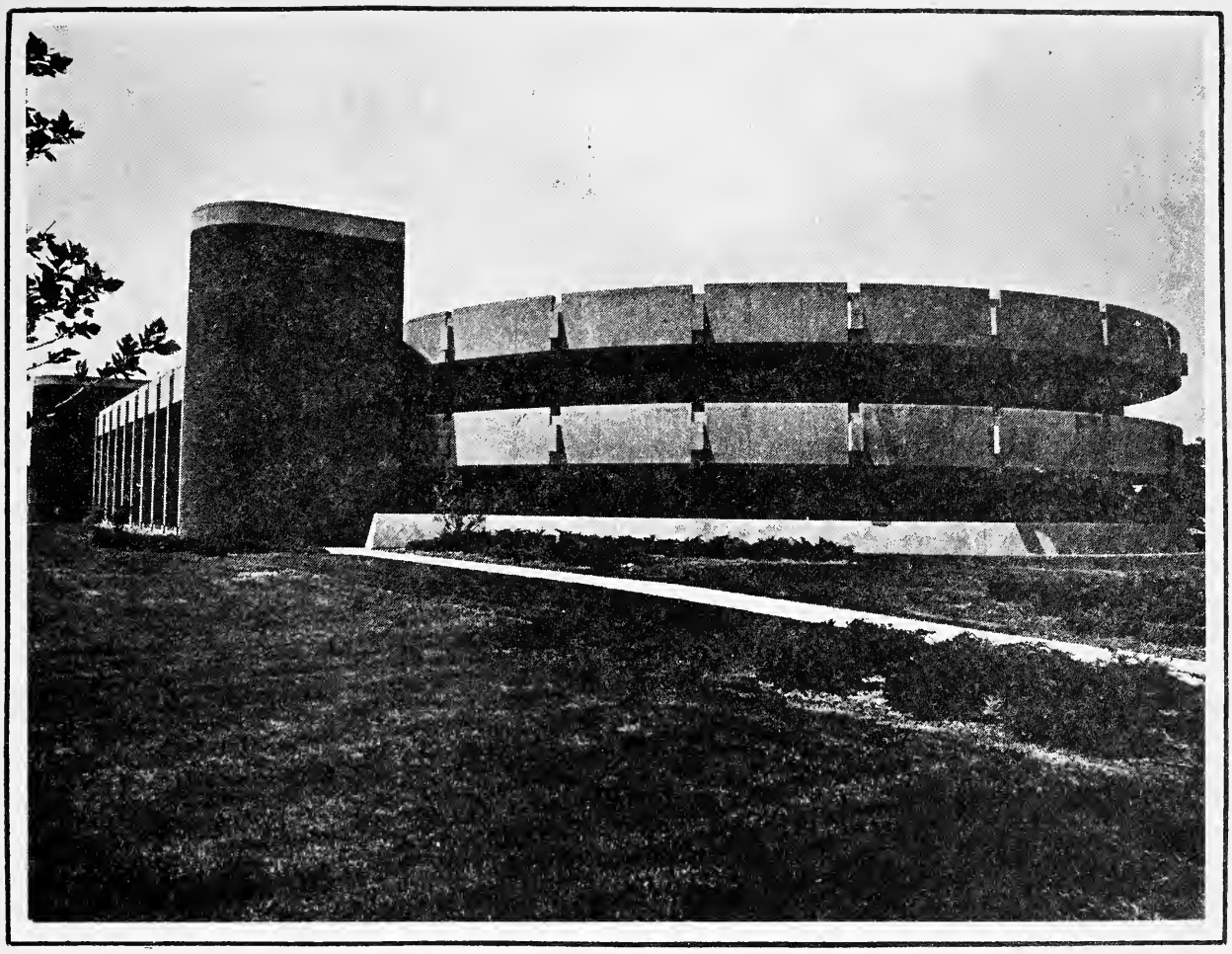
Correction

The *Indiana Law Review* apologizes to
Timothy L. Tyler
who was inadverently omitted from the list of contributors
to the 1989 Survey of Recent Developments.



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Volume 23 1989-1990

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In Memorial

Christopher M. Maine
Attorney, Bingham, Summers, Welsh & Spilman
J.D., 1990, Indiana University School of Law—Indianapolis

This issue of the Indiana Law Review is dedicated to the memory of Christopher M. Maine, a recent graduate of this Law School and a member of the Indiana Law Review. He will be greatly missed by all of us.

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Indiana Law Review

Volume 23 1990 Number 4

TABLE OF CONTENTS

Articles

The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid ..... *Caroline Forell* 781

A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants ..... *Stephen T. Maher* *Dr. Lori Blum* 821

Time For an Intermediate Court of Appeals: The Evidence Says "Yes" ..... *Stephen Safranek* 863

Notes

The Proper Scope of Claimant Coverage Under the Indiana Medical Malpractice 899

The Short History of a Rule of Evidence That Failed (Federal Rule of Evidence 609, *Green v. Bock Laundry Machine Co.* and the New Amendment) 927

Summary Jury Trials: A "Settlement Technique" That Places a Shroud of Secrecy on Our Courtrooms? 949

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The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid

CAROLINE FORELL*

Three learned judges are presented with the following set of facts and asked to provide the appropriate tort analysis. A young woman was badly injured when she fell down the stairs in her rented home because the stair railing was defective. It is undisputed that her landlord's failure to repair the defective railing violated a statute requiring landlords to maintain their rental properties in good repair. The tenant sues the landlord for injuries.

All three judges solemnly chant in unison: "*Caveat* lessee." They are right about this; the common law rule prevents tenants from suing their landlords for personal injuries suffered on the premises.[1]

Judge Number One concludes: "The statute does not expressly create a tort action; thus, none exists and the landlord cannot be sued."[2]

Judge Number Two scrutinizes the statute's penumbras and explains: "When the legislature enacted this statute, they intended to provide a civil remedy. Therefore, the injured tenant has an implied tort action."[3]

Judge Number Three concurs with Number Two that a tort action exists, but applies a common law, rather than a statutory, analysis by asserting: "This was a clear case of negligence per se."[4]

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* Associate Professor of Law, University of Oregon; B.A., University of Iowa, 1973; J.D., University of Iowa, 1978. Thanks to Professor Leslie Harris for a critique of an early draft. Nate Garvis, Oregon class of 1990, supplied valuable research assistance.

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1. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability*, 1975 WIS. L. REV. 19, 29; Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 23 (1949).

2. *See, e.g.*, Johnson v. Carter, 218 Iowa 587, 255 N.W. 864, 866-67 (1934); Richmond v. Warren Inst. of Sav., 307 Mass. 483, 30 N.E.2d 407 (1940).

3. *See, e.g.*, Mangan v. F.C. Pilgrim & Co., 336 N.E.2d 374, 379 (Ill. 1975); Humbert v. Sellers, 300 Or. 113, 708 P.2d 344 (1985).

4. *See, e.g.*, Morningstar v. Strich, 326 Mich. 541, 40 N.W.2d 719, 721 (1950).

This fact pattern is representative of the situations that this Article analyzes. In these situations, the defendant has breached a statutory duty of care in the process of injuring the plaintiff, and the following criteria are met:

1. The statute creating the duty is silent on whether a tort action should be provided for breach of the duty; and

2. Either the courts have not previously decided whether a common law tort action should be provided or the courts, without considering this statutory duty, have refused to provide such an action.

In describing these statutory duty actions,[5] Judge Number One's decision addressed the wrong issue. Although the legislature did not provide a tort action, the correct issue is whether, taking the statutory duty into account, the court should change the common law rule. Similarly, Judge Number Two was incorrect because legislatures, when enacting criminal or regulatory statutes, usually do not address the question of civil liability in any determinable way.[6] Judge Number Three was incorrect because negligence per se is a doctrine which modifies an existing common law negligence action.[7] Because in these situations there was no preexisting common law action, the creation of a new tort action based on a statutory duty is not negligence per se. Negligence per se terminology is particularly misleading where the court previously rejected a common law negligence action on similar facts. By creating a new tort action in such cases, the court overrules rather than supports previous case law.

Statutory duty cases are hybrids involving both the legislative and judicial branches.[8] The three examples introducing this Article highlight the need for a critical evaluation of statutory duties. These analyses typify how courts treat statutory duties.

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5. The closest counterpart to these actions is the implied right of action derived from federal statutes. In state courts, duties derived from statutes are also involved in a much larger category of cases, those which are described as negligence per se. *See infra* note 7 and accompanying text.

6. *See, e.g.*, Buckley, *Liability in Tort for Breach of Statutory Duty*, 100 LAW Q. 204, 207 (1984); Forell, *The Interrelationship of Statutes and Tort Actions*, 66 OR. L. REV. 219, 254 (1987); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 320 (1914).

7. *See, e.g.*, Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 37 (Iowa 1982); W. PROSSER & W. KEETON, ON TORTS 222 (5th ed. 1984).

8. *See* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 473 (1962):

> In one respect, however, tort law has depended heavily on applications of statutes as a guide to civil decisions within the context of negligence per se and related doctrines. This development demonstrates that the legal system is not confronted with an either-or choice between decisional and statutory creativity for solution of emerging problems.

A combination of the twentieth century's "orgy of statute making"[9] and the litigation explosion has resulted in a large number of statutory duty cases. Regardless of whether cases involved the liability of landlords, dramshop operators,[10] police officers,[11] private hospitals,[12] dog owners,[13] drivers who failed to render aid,[14] or municipalities,[15] state courts consistently fail to ask, much less answer, the right questions. Most fundamentally, where there is no evidence of legislative intent to create a tort action, but there is an applicable statutory duty, should the court exercise its common law powers and provide a new tort action based on the statutory duty? If the answer to this question is yes, then the court must consider additional issues: the elements of the new tort action; and which of those elements the legislature has determined or the judge or jury should determine.

The few commentators writing about statutory duties in the state court context for the most part have also ignored these issues.[16] In contrast, these issues have been subjects of scholarly debate in the federal context[17] and in other common law countries such as England[18] and Canada.[19] Nevertheless, the confusion so evident at the state level is

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9. G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977).

10. *See, e.g.,* Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Rong Yao Zhou v. Jennifer Mall Restaurant, 534 A.2d 1268 (D.C. 1987).

11. *See, e.g.,* Irwin v. City of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984); Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983).

12. *See, e.g.,* Guerrero v. Copper Queen Hosp., 122 Ariz. 104, 537 P.2d 1329, 1331 (1975); Cain v. Rijken, 300 Or. 706, 717 P.2d 140 (1986).

13. *See, e.g.,* Lange v. Minton, 303 Or. 484, 738 P.2d 199 (1987).

14. *See, e.g.,* Brooks v. E.J. Willing Transp. Co., 40 Cal. 2d 669, 255 P.2d 802 (1953); Brumfield v. Wofford, 143 W. Va. 332, 102 S.E.2d 103 (1958).

15. Turner v. District of Columbia, 532 A.2d 662 (D.C. 1987).

16. *See, e.g.,* Comment, *Implied Causes of Action in State Courts*, 30 STAN. L. REV. 1243 (1978) [hereinafter Comment, *Implied Causes*]; Gamm & Eisberg, *The Implied Rights Doctrine*, 41 U. Mo. K.C. L. REV. 292 (1972) (describing statutory duties as implied rights of action). *See also* Love, *supra* note 1 (landlord/tenant); Comment, *Cain v. Rijken: Creation of a Statutory Duty of Care to Protect Others from the Tortious Conduct of Third Parties*, 23 WILLAMETTE L. REV. 493 (1987) (hospital liability for outpatient's conduct). Notable exceptions to this are: Morris, *supra* note 1, at 21-27 and Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 456 (1948).

17. *See, e.g.,* Ashford, *Implied Causes of Action Under Federal Law: Calling the Court Back to Borak*, 79 NW. U.L. REV. 227 (1984); Bender, *The Powell-Stevens Debates on Federalism and Separation of Powers*, 15 HASTINGS CONST. L.Q. 549 (1988); Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); Mowe, *Federal Statutes and Implied Private Actions*, 55 OR. L. REV. 3 (1976); and Note, *Implied Private Rights of Action*, 123 U. PA. L. REV. 1392 (1975).

18. Buckley, *supra* note 6.

19. *See, e.g.,* Klar, *Recent Developments in Canadian Law: Tort Law*, 17 OTTAWA L. REV. 325, 350-53 (1985); Klar, *Developments in Tort Law: The 1982-83 Term*, 6 S. CT. L. REV. 309, 314-15, 323-24 (1984); Linden, *Tort Liability for Criminal Nonfeasance*, 44 CAN. B. REV. 25 (1966); Comment, 62 CAN. B. REV. 668 (1984).

universal; federal courts and courts of other common law countries continually wrestle with the problems which statutory duties present.[20] Besides attempting to clarify this confusion, analysis of statutory duties at the state level has broad implications in areas such as federal implied rights of action, common law "no duty" defenses[21] and, in particular, negligence per se.

Before thoroughly examining statutory duty actions, the analytical framework which applies when a statute appears to be relevant to a tort case must be introduced.[22] The first issue to resolve is whether the statute applies to the defendant's conduct. The usual statutory purpose test is whether the statute was intended to protect persons like the plaintiff from the risk that resulted in the plaintiff's injury.[23] This is a *focus* test.[24] A focused statute is one which was intended to create a duty which the defendant owed to the plaintiff in the situation upon which plaintiff's case is based.[25]

If the statute is focused, the second question is whether the legislature either expressly or implicitly created a tort action. Legislatures occasionally enact statutory torts, such as wrongful death acts.[26] Such express

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20. *See, e.g.,* Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989); Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11 (1979); Cort v. Ash, 422 U.S. 66 (1975); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Cunningham v. Moore, 28 D.L.R.3d 277 (Can. 1972); Thornton v. Kirklees Metro. Borough Council, (1979) Q.B. 626.

21. Examples of categorical "no duty" defenses which statutory duties have affected are: purely economic injury, Adam v. State, 380 N.W.2d 716 (Iowa 1986); purely psychic injury, Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983); the no duty to rescue doctrine, Brooks v. E.J. Willing Transp. Co., 40 Cal. 2d 669, 255 P.2d 802 (1953); and the public duty doctrine, Schear v. Board of County Comm'rs, 687 P.2d 728 (N.M. 1984).

22. *See* Forell, *supra* note 6.

23. *See* Beeman v. Gebler, 86 Or. App. 190, 193 (1987).

> Claims based on theories of statutory tort or negligence per se require both an initial determination that the statute or rule which is the source of the defendant's duty protects a class of persons of which the plaintiff is a member by proscribing or requiring certain conduct and that the harm that the defendant has inflicted is of the type against which the rule is intended to protect.

Id. See also RESTATEMENT (SECOND) OF TORTS § 874 comment i (1965).

24. *See* MORRIS, ON TORTS 167-72 (2d ed. 1980).

25. Inevitably, the judge's determination of these issues is, in many cases, somewhat subjective. *See, e.g.,* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 427 (1989) ("The characterization of legislative purpose is an act of creation rather than discovery."). *See also* Moore, *Semantics of Judging*, 54 S. CALIF. L. REV. 151, 167 (1981).

26. *See, e.g.,* ILL. REV. STAT. ch. 70, para. 1 (1987); N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 1981); OR. REV. STAT. § 30.020-.070 (1989). The Michigan legislature expressly created a statutory tort action against a landlord:

> (1) When the owner of a dwelling regulated by this act permits unsafe, unsanitary or unhealthful conditions to exist unabated in any portion of the dwelling . . .

statutory torts are unusual; implied statutory torts are even rarer. Implied statutory torts may be found by negative implication[27] or because the text of a criminal or regulatory statute mentioned a civil defense such as assumption of risk.[28]

A focused statute which does not create a statutory tort is an *influencing statute*. Such a statute neither provides nor disallows a tort remedy; however, because it is focused the court should consider whether changing the existing common law rule would better effectuate the statute's purpose. The court should examine the appropriateness of using the statutory duty as a basis for providing a common law tort remedy. Statutory duty actions, by definition, always involve influencing statutes.[29]

The first section of this Article considers two issues concerning the roles of the legislature, judge, and jury. First, it examines which branch of government, the legislature or the judiciary, is the source of statutory duty actions. Second, it discusses whether a statutory duty should affect the roles of judge and jury. This Article addresses these issues from the jurisprudential position that state judges are legitimate lawmakers[30] who,

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where such condition exists in violation of this act any occupant after notice to the owner and a failure thereafter to make the necessary corrections shall have an action against the owner for such damages he has actually suffered as a consequence of the condition.

MICH. COMP. LAWS ANN. § 125.536 (West 1989). *Accord* Landlord and Tenant Act 1985 § 8 (England's statutory tort action for tenants' injuries on landlord's premises).

27. *See, e.g.,* VT. STAT. ANN. tit. 12, § 519 (1973):

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

(b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive renumeration. (By negative implication a person who does not provide reasonable assistance would be liable.)

Id. See also Chartrand v. Coos Bay Tavern, 298 Or. 689, 698 P.2d 513 (1985) (statute created liability for dramshop operators by negative implication).

28. *See* Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in State and Federal Courts*, 71 CORNELL L. REV. 501, 520 (1986). *See, e.g.,* Safety Appliance Act, 45 U.S.C. § 7 (1982); Mines and Quarries Act, 1954, Vict. sched. 157 (Eng.); Mines Act, 1958, Vict. sched. 411 (Eng.) (all referring to civil defenses).

For examples of implied statutory prohibitions on tort actions see Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) (no action allowed because legislative history expressly indicated that Congress did not intend to create a federal right of action); Hayman v. Morris, 36 N.Y.S.2d 756 (N.Y. Sup. Ct. 1942).

29. *See* RESTATEMENT (SECOND) OF TORTS § 874A comment d (1965).

30. I align myself with those legal scholars who believe that courts make law

when they make law, should do so openly.[31] Because our system of government allows state courts to make law,[32] state court judges are not compelled to attribute the law they make to the legislature. The first Section concludes that it is judges who create statutory duty actions, and that it is appropriate for them to do so openly when they believe that providing such actions best effectuates the purpose of focused statutes. It further concludes that a court's determination that a statute is focused should preempt the usual role of the jury as the determiner

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instead of merely finding it. *See, e.g.*, Green, *The Thrust of Tort Law Part II: Judicial Law Making*, 64 W. VA. L. REV. 115 (1962); Keeton, *supra* note 8; O'Connell, *Ruminations on Oregon Negligence Law*, 24 WILLAMETTE L. REV. 385 (1988); Moore, *supra* note 25, at 151; Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1 (1990).

There is much jurisprudential disagreement over whether common law judges create law or find law. *Compare* H. HART, THE CONCEPT OF LAW (1961) (legal positivism) *with* L. GREEN, JUDGE AND JURY (1930) and O'Connell, *Ruminations on Oregon Negligence Law*, 24 WILLAMETTE L. REV. 385, 420 (1988) (legal realism). *See also* R. DWORKIN, LAW'S EMPIRE 313-14 (1986) (chain novel analogy). Nevertheless, it is undeniable that state appellate court decisions regularly change the legal landscape without clear guidance from other branches of government. Major examples of judicial lawmaking in the area of tort law are both the creation and the later abolition of parental and spousal immunities and the development of actions for intentional infliction of emotional distress and strict products liability.

For an example of how a positivist court deals with its common law lawmaking powers, see Heino v. Harper, 306 Or. 347, 368-75, 759 P.2d 253, 262-65 (1988) (abolishing spousal immunity).

31. *See* Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

32. The United States Supreme Court has never held that the limits imposed on federal common lawmaking, *see, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938), should also be applied to state common lawmaking. In fact, federalism has been one of the bases for limiting federal common lawmaking while allowing state common lawmaking. *See, e.g.*, Court v. Ash, 422 U.S. 66 (1975). The Court set out a four-part test for determining when a right of action should be implied from a federal statute. One of the factors was whether "the cause of action (was) one traditionally relegated to state law, in an area basically the concern of the States, so that is would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78.

Commentators agree that state courts can and do make law. "[C]ourts . . . have made the great bulk of tort law and legislatures have made comparatively very little." Green, *supra* note 30, at 117. *See also* Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749 (1965); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, (1967).

Another distinction between federal judges and many state judges in regard to whether they are appropriate lawmakers is that federal judges are appointed while many state judges are elected. Voters hold elected judges accountable for the law they make on controversial social issues. The most dramatic recent example of this was the 1986 California election in which three "liberal" judges, Chief Justice Rose Bird, Justice Cruz Reynoso and Justice Joseph Grodin, were rejected by the voters and removed from the California Supreme Court after an extremely politicized campaign.

of the scope of duty. Instead, the judge's application of the focus test should determine the scope of the duty as a matter of law.

The second Section of this Article analyzes the different kinds of statutory duties: those that use the mandatory "shall" or similar language and those that use the permissive "may" or similar language. This Article then discusses the two different kinds of influencing statutes which provide these duties — declaratory statutes which provide no remedy of any kind, and statutes which contain criminal and administrative penalties. The final Section of this Article proposes an analysis for judges to apply when presented with statutory duties which can be synthesized with present tort doctrine.

I. The Roles of Legislatures, Courts, and Juries in Statutory Duty Actions

A. The Source of Statutory Duty Actions

Statutory duty actions exist in most jurisdictions. Some courts maintain that the source of these actions is legislative;[33] a few claim that the source is judicial;[34] and many others equivocate.[35] Many of the courts

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33. *See, e.g.,* Bob Godfrey Pontiac v. Roloff, 291 Or. 318, 342, 630 P.2d 840, 854 (1981) (Linde, J., concurring); Burnette v. Wahl, 284 Or. 705, 727, 588 P.2d 1105, 1117 (1978) (Linde, J., dissenting); Groves v. Wimborne, (1898) 2 Q.B. 402, 407.

See also Restatement (Second) of Torts § 874A comment g (1965); Atiyah, *Common Law and Statute Law*, 48 Mod. L. Rev. 1 (1985). "As all lawyers know, the theory of the civil action for breach of statutory duty is that the courts find in some legislative prohibition an implied intention on the part of Parliament to create civil liability for its breach." *Id.* at 12-13.

The United States Supreme Court once espoused this view in Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39-40 (1916). However, as noted in Restatement (Second) of Torts § 874A comment g (1965):

> A special problem exists for the federal courts dealing with federal legislation. In cases brought before the federal court solely for diversity of citizenship of parties there is ordinarily no federal "general common law". . . . There is a doctrine of "federal common law" in areas of distinctly federal concern. . . . [B]ut in cases of this nature the federal courts have noted that their role is of narrower scope and more modest than that of state courts engaged in reshaping common law rules governing relations between private individuals. . . . Predominantly, . . . the federal courts address areas of federal private remedy in terms of carrying forward a federal statute or a provision of the United States Constitution.

34. *See, e.g.,* Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983).

35. *See* Holdych, *The Presumption of Negligence Rule in California: The Common Law and Evidence Code Section 669*, 11 Pac. L.J. 907, 921-23 (1980) (discussing the California courts' treatment of statutory duty actions).

Most scholars recognize statutory duty actions and attribute their existence to the

which maintain that statutory duty actions are legislative use one of three analyses. Some claim that when the legislature enacted a criminal or declaratory statute, it also intended to impliedly create a tort action.[36] Other courts assert that unless a common law tort action already existed or the statute expressly created such a tort action, the legislature intended that none be allowed.[37] In addition, a few courts erroneously attribute to the legislature the ancient equitable doctrine that there is no right without a remedy.[38]

These three bases for claiming that statutory duty actions are legislative creatures are analytically unsound. The first view that, by enacting a statute which is silent on the issue of civil liability, the legislature implicitly created a tort action, is not realistic.[39] It is difficult enough for legislators to enact statutes at all. The compromises and debate that

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judiciary. *See, e.g.,* Buckley, *supra* note 6, at 232; Forell, *supra* note 6, at 244; Morris, *supra* note 1, at 23-25; Note, *The Use of Criminal Statutes*, *supra* note 16, at 459; RESTATEMENT (SECOND) OF TORTS § 874A (1965). *But see* Foy, *supra* note 28, at 571. Professor Foy would limit the impact of statutes to situations where a state legislature intended, either expressly or impliedly, to create a tort action. His justification for this radical proposal is that state law would then be in line with the present treatment of federal statutes under the federal implied rights of action doctrine. However, Professor Foy himself is concerned about the appropriateness of the federal doctrine. *Id.* at 582-85.

In contrast to the uncertainty that surrounds statutory duty actions, negligence per se's existence is well-established and its source in common law is widely accepted. *See, e.g.,* Justice Traynor's statement in Clinkscales v. Carver, 136 P.2d 777, 778 (1943):

> A statute that provides for a criminal proceeding only does not create a civil liability; if there is no provision for a remedy by civil action to persons injured by a breach of the statute it is because the Legislature did not contemplate one. A suit for damages is based on the theory that the conduct inflicting the injuries is a common-law tort. . . . The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. . . . The decision as to what the civil standard should be rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it.

See also RESTATEMENT (SECOND) OF TORTS § 874A comment e (1965).

36. *See, e.g.,* Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947); Amberg v. Kinley, 214 N.Y. 531, 108 N.E. 830, 831 (1915).

37. *See, e.g.,* Mack v. Wright, 180 Pa. 472, 36 A. 913 (1897); Queen v. Saskatchewan Wheat Pool, 1 S.C.R. 205, 143 D.L.R. 9 (1983). At least two commentators agree: Thayer, *supra* note 6, at 320 and Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MOD. L. REV. 233, 256 (1960).

38. *See, e.g.,* Cutler v. Wandsworth Stadium, 1949 A.C. 398, 407, 1949 All E.R. 544, 550. *See infra* notes 131-33 and accompanying text.

39. "When it is said that civil liability hinges on the meaning of the statute, this effect is usually '*given*' to the legislation by the court and not '*found*' therein as claimed." A. LINDEN, CANADIAN TORT LAW 188 (3d ed. 1982).

resulted in most criminal or declaratory legislation reveal that legislators had enough on their minds in coming up with what they expressly provided. Usually, the legislature did not resolve the issue of whether civil liability ought to be allowed unless it expressly addressed this question in the statute.[40]

Implying a statutory tort based on a statutory duty is a legal fiction which directly conflicts with the analysis most courts use when a common law action exists. It is difficult to understand why some courts assert that legislatures intend to create implied statutory torts in the statutory duty area, and also assert that in the negligence per se area it is the court modifying the existing common law action, rather than the legislature impliedly creating an additional tort action.[41]

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40. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 364 (1932); J. FLEMING, THE LAW OF TORTS 114-15 (7th ed. 1987).

Erza Ripley Thayer put it well way back in 1914:

> [S]peculation as to unexpressed legislative intent is a dangerous business, permissible only within narrow limits; and the tendency to over-indulge it is responsible for much of the confusion in the law. Proper regard for the legislature includes the duty both to give effect to its expressed purpose, and also to go no further. . . . The true attitude of the courts, therefore, is to ascertain the legislature's expressed intent, to refrain from conjecture as to its unexpressed intent (except in so far as that inquiry is necessary in order to give effect to what is expressed), and then to consider the resulting situation in light of the common law.

Thayer, *supra* note 6, at 320.

41. *Compare* Shahtout v. Emco Garbage Co., 298 Or. 598, 601, 695 P.2d 897, 899 (1985) (negligence per se is a common law creature) *with* Nearing v. Weaver, 205 Or. 702, 711-14, 670 P.2d 137, 143-45 (1983) (statutory duty action is a statutory creature).

Possibly this false distinction made between the source of statutorily influenced actions where a common law action already exists and where it does not is due, in part, to confusion about how the federal implied rights of action doctrine relates to state law. The United States Supreme Court has determined that the federal courts' power to make law is extremely limited. Federal courts will only create "federal common law in cases raising issues of uniquely federal concern." Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 95 (1981). Therefore, cases rarely involve a federal statute's effect on an existing federal common law action, and a federal negligence per se doctrine has never flourished. Instead, cases in which focused federal statutes are present usually involve attempts to imply private rights of action from these statutes.

Since 1975, when the Supreme Court decided Cort v. Ash, 422 U.S. 66, however, the federal implied rights of action doctrine has been strictly limited to the rare cases in which the court finds clear legislative intent to provide a civil remedy. *See* Karahalios v. National Fed'n of Fed. Employees, Local 1263, 109 S. Ct. 1282 (1989); Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979). In Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979), the Court said: "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."

Examination of negligence per se reveals that when state courts developed this as a

Attributing negligence per se to the judiciary, and statutory duty actions to the legislature, may be partly politics. Where a common law action already exists, courts have previously made the policy decision to provide a tort remedy. The presence of a focused statute does not require courts to decide whether providing a tort remedy in these circumstances is sound public policy. Courts are willing to attribute the modification of an existing action to themselves because the change is not at the level of remedy versus no remedy, but is simply an incremental change regarding what kind of tort action plaintiff should have.

In contrast, where a common law action was rejected previously or the question is one of first impression, labelling a decision to create a new action "judicial" may be viewed as a judicial policy decision of substantial dimensions. The court must survey the legal landscape and determine whether allowing a cause of action will benefit society. In light of numerous recent charges of judicial activism or, more derogatorily, judicial legislating, and other related tort reform issues,[42] courts may be reluctant to allow new actions unless they can point to another entity as the source of these actions. As a result, the courts may choose to proclaim judicial deference to legislative will in order to more fully legitimize an unstated judicial policy decision.[43]

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purely common law doctrine, they paid no attention to how federal courts treated focused statutes. In contrast, the federal implied rights of action analyses appear to have affected some states' statutory duty analyses. *See, e.g.,* Bob Godfrey Pontiac v. Roloff, 291 Or. 318, 340-41 (1981) (Linde, J., concurring).

See also Gamm & Eisberg, *supra* note 16, at 292; Comment, *Implied Causes*, *supra* note 16, at 1243.

These state courts have accurately discerned that both statutory duty actions and federal implied actions involve the presence of focused statutes in situations where no common law civil action exists. However, these courts fail to comprehend that the widely accepted authority of state courts, unlike federal courts, to make law distinguishes how state courts can and should treat statutory duties from the federal courts' necessarily more limited treatment.

42. *See generally* P. Huber, Liability: The Legal Revolution and Its Consequences (1988). *See also* P. Atiyah & R. Summers, Form and Substance in Anglo-American Law 109 n.30 (1987).

43. *See* Green, *supra* note 30, at 123:

> [J]udges frequently deny that courts have the power to make law, and have asserted that the courts' function is to decide a case and declare the law that controls the decision; that judges may find the law but they do not make law. How much of this attitude reflects defensive coloration, how much is semantics, and how much honest belief cannot be known. Sometimes we think we detect the tongue in cheek; sometimes the protests are so violent that we are reminded of Shakespeare's lady. But giving the judges credit for a deep sense of innocence we suggest that no case can be decided without making law. The making of a decision of necessity means the making of law whether it is the result of statutory construction or the product of reasoning from precedent or principle.

See also Atiyah & Summers, *supra* note 42, at 117.

Implying statutory torts absent evidence that the legislature intended to create such actions may be counterproductive. The courts' credibility will be damaged if critics of judicial activism perceive that the judiciary is expanding tort liability while hiding behind the fiction of legislative approval. A more serious side effect of attributing statutory duty actions to the legislature is that it can lead courts to create causes of action routinely, without first considering and assessing the consequences that will flow from the judicial decisions. By attributing tort law changes to the legislature, courts often avoid discussing either principles or policy rationales for the changes. It is more principled and intellectually satisfying for courts to acknowledge that they are deciding whether a tort action should exist. In making this judicial decision, courts should give appropriate deference to the legislature by treating the presence of a focused statute as important in determining whether to provide an action.

Courts following this first view of attributing their actions to the legislature can be criticized for engaging in surreptitious judicial activism. At the other end of the spectrum, courts deserve criticism for failing to carry out their common law role in the lawmaking process by following the second view and asserting that unless a common law tort action already existed or the statute expressly provided for one the legislature intended that none be allowed.[44] The assertion that legislatures never intend to create tort actions unless they expressly provide for them is not implausible.[45] However, some courts go further than this and view legislative silence as also implying that the legislature did not want to change the present common law rule of "no tort action."[46] These courts contend that the legislature implicitly prohibited judicial creation of a tort action for violation of the statutory duty and, therefore, barred the courts from changing the status quo. These claims of legislative preemption and preclusion are legal fictions. There is no evidence that legislatures, when enacting criminal or regulatory statutes, routinely intend to prohibit tort actions.[47] Because statutory duty cases involve influencing

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44. *See* R. DWORKIN, LAW'S EMPIRE 312, 337-41; *see also* O'Connell, *supra* note 30, at 419-20.

45. *See* J. FLEMING, THE LAW OF TORTS 114 (7th ed. 1987). "But, save in exceptional cases . . . the legislature's silence on the question of civil liability rather points to the conclusion that it either did not have it in mind or deliberately omitted to provide for it." *Id.*

46. *See, e.g.,* Utley v. Hill, 155 Mo. 232, 55 S.W. 1091, 1103 (1900); Plevy v. Schaedel, 44 N.J. Super. 450, 454-55, 130 A.2d 910, 913 (1957); Burnette v. Wahl, 284 Or. 705, 711, 588 P.2d 1105, 1109 (1978). *Accord* Thayer, *supra* note 6, at 320.

47. Justice Hans Linde makes this point in Bob Godfrey Pontiac v. Roloff, 291 Or. 318, 342, 630 P.2d 840, 854 (1981):

> To assume that statutory silence means to exclude civil recovery attributes to the lawmakers a needlessly hostile policy toward making whole the intended

statutes, the court should decide whether a tort remedy should be allowed.

A few courts offer a third basis for attributing judicial actions to the legislature when a statute is declaratory and thus provides no express remedy, or when a statute provides a criminal or administrative penalty, but in no way provides a remedy to the injured party.[48] Because statutory duty cases are by definition ones where no common law action exists, courts treat the lack of an effective remedy for the plaintiff as an indication that the legislature intended to impliedly create a tort action. These courts turn the traditional equitable doctrine of no right without a remedy into a means for determining legislative intent. Once again, such courts are using a legal fiction. Although no right without a remedy may be a sound doctrine, it does not address the issue of the legislature's intention. Instead, it provides a principled basis for the court to create a new common law action.[49]

Courts which wholly attribute statutory duty actions to the legislature are refusing to acknowledge that courts are partially responsible for those actions. Statutes which neither expressly nor by clear implication create tort actions are not the source of statutory duty actions; they are also not the source of prohibitions against statutory duty actions. Although such a statute provides an obligation, it does not provide a civil remedy. Whether a remedy should be provided and, if so, what that remedy should be are issues courts should determine.

B. The Roles of Judge and Jury in Statutory Duty Actions

The judicial creation of a new tort action based on a statutory duty presents issues concerning the roles of the legislature, judge, and jury.

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beneficiaries of a statutory obligation imposed for their protection. Rather, when a plaintiff seek damages for injuries of a kind which a prohibitory or regulatory law was enacted to prevent, the court must decide without preconceived assumptions.

48. *See, e.g.,* Cutler v. Wandsworth Stadium, Ltd., 1949 A.C. 398, 407. *See infra* notes 131-33 and accompanying text.

49. The source of "no right without a remedy" has been traditionally judicial. *See* Foy, *supra* note 28, at 528. *See also* Texas Pac. Ry. v. Rigsby, 241 U.S. 33, 43 (1916); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). In many states it is also a state constitutional doctrine. *See generally* Schuman, *Oregon's Remedy Guarantee: Article 1, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35 (1986).

Oklahoma law is an exception to the claim that "no right without a remedy" is not statutory. An Oklahoma statute provides: "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation thereof in money, which is called damages." OKLA. STAT. ANN. tit. 23, § 3 (West 1955). A few Oklahoma cases have used this statute as the basis for providing new tort actions. *See, e.g.,* Johnson v. Harris, 187 Okla. 239, 102 P.2d 940 (1948); Crosbie v. Absher, 174 Okla. 593, 51 P.2d 970 (1935); Copeland v. Anderson, 707 P.2d 560, 564 (Okla. Ct. App. 1985).

Under a traditional negligence analysis, the judge determines whether the defendant owed the plaintiff a duty of care.[50] The jury determines whether there was a breach, cause in fact, foreseeability/proximate cause, and damages.[51] In a statutory duty action, the statute provides the duty the defendant owed to the plaintiff.[52] The judge is responsible for instructing the jury that the legislature has determined that the defendant owed this duty.

Of the remaining negligence elements, the issue of foreseeability presents the most difficulty because of an overlap between the focus test's function in determining the statute's applicability and foreseeability's "scope of duty" function.[53] If the focus test is crucial to the statutory duty analysis, and if this test supersedes foreseeability, a court's

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50. L. GREEN, JUDGE AND JURY 30 (1930); PROSSER & KEETON, *supra* note 7, at 236. In most negligence cases it is presumed that the defendant owed plaintiff a general duty of reasonable care. *See* Terry, *Negligence*, 29 HARV. L. REV. 40, 52 (1915): "There is a negative duty of due care of very great generality, resting upon all persons and owed regularly to all persons, not to do negligent acts." *Accord* E. WHITE, TORT LAW IN AMERICA 57 (1985), which refers to Professor Terry's views and says that they were "a restatement of Holmes' 'duty of all to all,' first formulated in 1873." *See also* Holmes, *The Theory of Torts*, 7 AM. L. REV. 652 (1873) (Mark DeWolfe Howe attributes this essay to Holmes in M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 64 (1964)).

51. Green, *supra* note 30, at 30-31. The terms proximate cause and legal cause are frequently used in place of the term foreseeability. *See* PROSSER & KEETON, *supra* note 7, at 165; RESTATEMENT (SECOND) OF TORTS § 328C (1965). Furthermore, cause in fact is often treated as a subcategory of proximate or legal cause. RESTATEMENT (SECOND) OF TORTS §§ 328c, 431 (1965).

In addition, many courts and commentators limit cause in fact to "but for" (*sine qua non*) causation. *See* HARPER, JAMES & GRAY, *infra* note 53, § 20.2 at 91. Others apply a "substantial factor" test which requires that "defendant's conduct has such an effect in producing the harm as to lead reasonable men (sic) to regard it as a cause." RESTATEMENT (SECOND) OF TORTS § 431 comment a (1965). *See also* Smith, *Legal Cause in Actions of Torts*, 25 HARV. L. REV. 103, 223, 229 (1911). I prefer "substantial factor" to "but for" in assessing cause in fact because it leaves the jury a little bit of judgment beyond the purely factual issue of whether A was a cause of B. If substantial factor were the test for cause in fact in a statutory duty case it would allow the jury to retain a small degree of normative input when focus entirely preempted foreseeability. *See infra* note 63 and accompanying text.

52. If the duty is mandatory and specific, see *infra* note 67 and accompanying text, some courts may also use the statute to determine what constitutes breach, thereby making defendants strictly liable for the consequences of their prohibited acts. *See, e.g.*, Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983) (described as an implied statutory tort action, but actually a statutory duty action). Most statutes used to affect civil liability are strict liability statutes. *See* Forell, *supra* note 6, at 263.

In cases involving mandatory and specific duties, all that remains for the jury to determine on the breach question is whether the defendant did the prohibited act.

53. F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS ch. 18 (2d ed. 1986).

finding that a focused statute provides the duty precludes the jury from determining the scope of duty.

Focus is the means courts use to determine whether the legislature intended that persons like the defendant owed a certain statutory duty to persons like the plaintiff. "[I]t is only with reference to the risks perceived by the lawmakers that the actor has set his judgment up against theirs in omitting a statutory requirement."[54] Unless a finding of focus is made, the statute cannot realistically be considered the source of the defendant's duty to the plaintiff. Without focus, the statute is only some evidence of what the common law rule should be.[55]

Examination of the focus and foreseeability tests shows that they are redundant. A statute has focus if its purpose is to protect persons like the plaintiff from the risk of harm the plaintiff suffered. This is the test courts usually apply to determine whether a statute ought to affect a civil liability.[56] Although tests for foreseeability have been described in many different ways, there is widespread agreement that foreseeability tests address whether it is fair to hold the defendant responsible to someone in the plaintiff's situation for the risk of harm the plaintiff suffered.[57] When one compares the tests for focus and foreseeability, their similarity is apparent.[58]

The functions of focus and foreseeability are also similar. Focus limits a statutory duty's use to tort cases that serve the purpose the statute was intended to accomplish; focus provides the statutory duty's boundaries. The function of foreseeability is to limit defendant's liability to situations where, applying community standards, it is fair and reasonable to find liability.[59] It limits liability by having the jury determine

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54. HARPER, JAMES & GRAY, *supra* note 53, § 17.6, at 629 n.32.

55. RESTATEMENT (SECOND) OF TORTS § 288B comment d (1965); HARPER, JAMES & GRAY, *supra* note 53, § 17.5, at 605-06.

56. *See, e.g.*, Ontiveros v. Borak, 135 Ariz. 500, 667 P.2d 200, 211 (1983) (statutory duty); Lange v. Minton, 303 Or. 484, 488, 738 P.2d 576, 578 (1987) (statutory duty); Stachneiwicz v. Mar-Cam Corp., 259 Or. 583, 586, 488 P.2d 436, 438 (1971) (negligence per se); Erickson v. Kongsli, 240 P.2d 1209, 1210 (Wash. 1952) (negligence per se). *Accord* HARPER, JAMES & GRAY, *supra* note 53, § 17.6, at 628; MORRIS, ON TORTS 168 (2d ed. 1980); W. PROSSER & W. KEETON, ON TORTS 224-25 (5th ed. 1984).

57. *See* HARPER, JAMES & GRAY, *supra* note 53, at 655. "The obligation to refrain from that particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. . . . [This] is the prevailing view." *Id.*

58. *Id.* at 662-63.

59. *See, e.g.*, HARPER, JAMES & GRAY, *supra* note 53, at 657-59, 747; O'Connell, *supra* note 30, at 432-33 ("But foreseeability has relevance in negligence cases only in its normative sense: harm is deemed foreseeable only if we decide that defendant is eligible for the imposition of liability.").

The jury's roles in tort actions are that of factfinder, law applier, and determiner

who ought to be protected from what risks in the particular set of circumstances which the jury concludes existed in the case before them. Although foreseeability is sometimes described as purely a question of fact,[60] it is more accurately a mixed question of fact and policy. The jury must determine what actually happened and then make the normative determination of whether the plaintiff and the risk of harm the plaintiff suffered were *reasonably* foreseeable; thus, "the concept of foreseeability is elastic."[61] The foreseeability element is satisfied where the defendant actually foresaw neither the plaintiff nor the risk because defendant's failure to foresee may have been unreasonable. Foreseeability is also satisfied when a reasonable person could not have foreseen either the way the accident occurred or the extent of injury to plaintiff.[62] Both focus and foreseeability are means of deciding what the limits on defendant's duty *ought* to be. Therefore, the determination that a statute is focused should preclude the jury's determination of foreseeability.[63]

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and applier of community norms. Defenders of the jury's role as determiners of social values argue that it is more appropriate that jurors, instead of trial judges, determine such things as the scope of duty based on foreseeability. They assert that jury determinations of what is fair are more likely to represent the community's values than would a judge's determination. The jury is viewed "as a microcosm of the community, applying the moral standards forged by society, democratizing the judicial process and ameliorating the harshness of rules of law." *Id.* at 414-15. Thus described, it provides the next best thing to a legislative determination of who and what are deserving of legal protection. *But see* L. GREEN, JUDGE AND JURY 412-17 (1930).

60. "Foreseeability is a judgment about a course of events, a factual judgment that one often makes outside any legal context." Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1, 4 734 P.2d 1326, 1327 (1987). *But see* O'Connell, *supra* note 30, at 395: "There is language in . . . opinions which might be taken as an indication that the court considers foreseeability as an empirical fact. But this position cannot be taken seriously because the term is always defined in each case by the decision maker's conceptions of the defendant's liability."

61. HARPER, JAMES & GRAY, *supra* note 53, § 18.2, at 669.

62. Most courts and commentators agree that the exact manner in which the injury occurs is irrelevant to the question of foreseeability; only the general risk of harm needs to be reasonably foreseeable. "[T]he concept of foreseeability refers to generalized risks of the type of incidents and injuries that occurred rather than predictability of the actual sequence of events." Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1, 21, 734 P.2d 1326, 1338 (1987).

Furthermore, most courts and commentators agree that so long as the general risk of harm to plaintiff was reasonably foreseeable, the fact that the extent of harm was much greater than a reasonable person would have anticipated is irrelevant. It is a "universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated." Petition of Kinsman Transit Co., 338 F.2d 708, 724 (2d Cir. 1964).

63. The one exception to this when both a common law negligence action exists and a permissive statute is present is discussed *infra* note 88 and accompanying text.

The essential corollary to this is that if a statute is not focused, it should not preclude a jury's determination of foreseeability even though it is somewhat relevant to the case at bar.

For example, if a statute requires landlords to maintain their rental property in a habitable condition for the protection of their tenants, and a tenant is injured because a landlord violated this duty, the statute is focused and the court should consider incorporating the statutory duty into a new common law liability rule. In such a case, the jury's foreseeability role was preempted. In contrast, if a trespasser who occupied the landlord's premises without the landlord's consent is injured, the statute is not focused, and the statutory duty should not be the basis for the court's common law rule. It might be a factor the court considers in determining whether to allow injured trespassers to bring an action. However, if the court allows an action, the statute should in no way change the judge's role as the determiner of duty and the jury's role as the determiner of foreseeability.

Thus, in the case of the injured tenant, the court might use the statutory duty as the basis of a new tort action. If it did, there would be no foreseeability issue for the jury to decide because the court's finding of focus would determine the scope of duty question. In the case of the injured trespasser, the court could create a duty if it found one was appropriate, and the jury would determine the scope of that duty through a foreseeability test.[64]

Deciding whether the legislature determined the scope of a duty, or whether the jury should do so, requires courts to acknowledge that it is often difficult, if not impossible, to discover what the legislature intended. Courts should be conservative in determining a statute's cov-

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64. The presence of a habitability statute could cut either way on the question of whether the court should create a tort action for an injured trespasser. On the one hand, the court might conclude that the legislature provided protection to one class of persons with the intent of excluding all others. Creation of a new tort action would therefore interfere with the purpose of the statute. On the other hand, the court might conclude that the legislature's express provisions protecting some people from the risk of harm that befell plaintiff is evidence that the legislative purpose would be best served if the court provided tort actions for all persons injured when the conduct the statute prohibited was engaged in.

If there was a question of fact about whether plaintiff was a trespasser, then it might be appropriate for the court to instruct the jury that if it found plaintiff was a tenant, no issue of foreseeability would be allowed. On the other hand, if the jury found that the plaintiff was a trespasser, and if the court decided to allow an action by a trespasser, the jury would apply a foreseeable plaintiff/foreseeable risk test. The harder case would be where the injured party was a tenant's guest. *See* Daniels v. Brunton, 7 N.J. 102, 80 A.2d 547 (1951); Humbert v. Sellers, 300 Or. 113, 708 P.2d 344 (1985). The court would have to examine the legislation closely to determine whether tenant's guests were intended to be protected and instruct the jury accordingly.

erage, and only base a civil action on the statutory duty when persons and risks fail within the core of the statute's coverage.[65] Courts should not claim legislative authority as the basis for what was actually judicial law-making.

When cases involve legislation of uncertain applicability, courts should acknowledge that although the statute may be relevant to the court's decision whether to create a new action, it is not focused. Any allowed action is purely a judicial creation, and the court should allocate functions between the judge and jury in the usual way. In these cases, courts should leave the scope of duty issue to the jury's application of the foreseeability test.[66]

II. The Different Kinds of Statutory Duties

A. The Standard of Care in Statutory Duty Actions

A focused statute can be the source of the duty to prevent injury. A related issue is what standard of care should be applied when a statute is the source of a tort action's duty. Statutory language varies greatly. The most important variation concerning the standard of care is mandatory "shall" language contrasted with permissive "may" language.

1. Mandatory Statutory Duties.—Most courts addressing the issue of the standard of care involving a focused statute have done so in the negligence per se context. Typically, the statutes use mandatory language such as "shall" or "must" and describe the prohibited or mandated conduct very specifically. Classic examples of these statutes are various traffic regulations concerning speed limits, stop signs, and traffic lights. When violations of these statutes are prosecuted criminally, the standard of care is strict liability; that is, if defendants engaged in the prohibited conduct they are guilty.[67] When these statutes are used in the civil arena, more leeway is provided through whatever negligence per se test a particular jurisdiction applies. Some form of either negligence per se with excuses[68] or prima facie evidence of negligence[69] is most commonly used.

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65. Gattman v. Favro, 306 Or. 11, 757 P.2d 402 (1988). *See* Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 607-08 (1958).

66. Of course, where the evidence presented is insufficient to allow a reasonable jury to find foreseeability, the court can determine the scope of duty/foreseeability issue. *See, e.g.*, Hefty v. Comprehensive Care Corp., 307 Or. 247, 766 P.2d 1026 (1988). The court said: "[I]n an extreme case a court can decide that no reasonable factfinder could find the risk foreseeable. . . . This is an 'extreme case.'" *Id.*

67. LaFave & Scott, Criminal Law 242 n.1 (2d ed. 1986).

68. Singleton v. Collings, 40 Colo. App. 340, 574 P.2d 882 (1978); Carter v.

Whatever negligence per se standard of care a court uses in cases in which a common law negligence action already exists is equally appropriate as the uniform standard used when a court creates a new mandatory statutory duty action. Nevertheless, courts sometimes use a different standard of care in mandatory statutory duty cases without providing any explanation. For example, the District of Columbia Court of Appeals recently created two statutory duty actions. One used an ordinary negligence standard of care; the other used the District's negligence per se standard.

In *Turner v. District of Columbia*,[70] a mother sued the District of Columbia for the wrongful death of her child, alleging the District had breached its specific mandatory duties under the Child Abuse Prevention Act.[71] Because the District had failed to remove plaintiff's infant son from his abusive father's custody, the baby died of starvation and dehydration.[72] The District of Columbia Court of Appeals previously had held, based on the much criticized but widely followed public duty doctrine,[73] that no tort action lay against the government when the injury allegedly resulted from the government's failing to provide public services.[74] In *Turner*, the court rejected this common law rule because of the presence of a number of focused statutes. The District's standard of care when a common law negligence action already existed and a focused statute was present was negligence per se with excuses.[75] Nevertheless, in this statutory duty action based on the Child Abuse Prevention Act, the court declared that the standard of care was ordinary negligence.

The use of the ordinary negligence standard of care in *Turner* was inconsistent with the District of Columbia courts' use of the negligence per se with excuses standard of care, both in its cases in which a common

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William Sommerville & Son, Inc., 584 S.W.2d 274, 278-79 (Tex. 1979). *See also* RESTATEMENT (SECOND) OF TORTS § 288A (1965).

69. *See, e.g.*, Satterlee v. Orange Glenn School Dist. of San Diego County, 29 Cal. 2d 581, 592, 177 P.2d 279, 285 (1947); Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270 (1976); Freund v. DeBuse, 264 Or. 447, 451, 506 P.2d 491, 493 (1973); Duncan v. Wescott, 142 Vt. 471, 476, 457 A.2d 277, 279 (1983).

70. 532 A.2d 662 (D.C. 1987).

71. 24 D.C. Reg. 3341 (1977) (codified as amended at D.C. CODE ANN. §§ 6-2101 to -2127 (1981 & Supp. 1987)).

72. *Turner*, 532 A.2d at 666.

73. This doctrine rejects tort liability for public entities because the duty to protect is owed only to the public at large and not to any particular individual who might be injured unless a special relationship exists. *See infra* notes 107-08 and accompanying text.

74. Platt v. District of Columbia, 467 A.2d 149 (D.C. 1983).

75. Leiken v. Wilson, 445 A.2d 993, 1002 (D.C. 1982); Bauman v. Sragow, 308 A.2d 243, 244 (D.C. 1973).

law negligence action already existed, and in a later specific and mandatory statutory duty case, *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*[76] *Zhou* presented the issue of whether the District of Columbia's Alcoholic Beverage Control Act,[77] which provided that tavern owners had a statutory duty not to serve alcohol to intoxicated persons, was an appropriate basis for a tort action against a tavern owner by a third party injured in an automobile accident with a drunk driver. This was a case of first impression.[78] In *Zhou,* the court created a tort action because of the presence of a focused statute. Without the statutory duty, the court would not have allowed a tort action.[79]

Although no common law negligence action against a tavern owner existed, the court labeled the new action it created based on a specific and mandatory statutory duty, "negligence *per se*."[80] As noted earlier,

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76. 534 A.2d 1268 (D.C. 1987).

77. D.C. CODE ANN. §§ 25-101 to -139 (1981). The language of this statute arguably places it in the permissive rather than mandatory category. It prohibits tavern owners from "permit[ting] on the licensed premises . . . the consumption of any beverage by any intoxicated person. . . ." The use of the word "permit" in other contexts has been treated as providing for exercise of some judgment and therefore as making an ordinary negligence standard of care appropriate. *See infra* note 87 and accompanying text.

78. Apparently, this issue had never been presented on a purely common law basis.

79. Certainly, the traditional common law rule has been that, unless there is a focused statute, a tavern owner is not liable to third parties for injuries drunk drivers cause. *See supra* note 10. However, starting with Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), many jurisdictions have changed their common law rule to allow liability.

See also Mitseff v. Wheller, 38 Ohio St. 3d 112, 526 N.E.2d 798 (1988), in which the court created a new statutory duty action against a social host who served alcohol to a minor who was then involved in an auto accident in which plaintiff was injured. The court distinguished *Mitseff* from a previous case, Settlemyer v. Wilmington Veteran's Post No. 49, 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984), in which the court had refused to create a new tort action against a social host who served a visibly intoxicated guest who was then involved in an auto accident in which plaintiff was injured. The court explained:

> There exists a clear distinction between *Settlemyer* . . . and the case before this court. *Settlemyer* concerned a social host providing alcohol to one who was apparently an adult guest, an act that is *not precluded by statute.* However, appellee provided Johnson, a seventeen-year-old minor, with alcohol. This action was clearly in violation of R.C. 4301.69. . . . Therefore, it is incorrect to maintain that appellee's action, which violated a statute, can be equated with *Settlemyer.* . . . The statute created a duty that appellee, because of Johnson's age, refrain from furnishing Johnson with alcohol. Accordingly, *Settlemyer,* being distinguishable, does not apply.

Mitseff, 38 Ohio St. 3d at 114, 526 N.E.2d at 800 (emphasis added).
The *Mitseff* court does not say what kind of tort action they created, but most likely, because negligence per se was not mentioned, the action is for ordinary negligence.

80. *Zhou,* 534 A.2d at 1275. For a similar treatment and labelling of a new statutory duty action against a tavern owner as "negligence pe se," see Davis v. Billy's

negligence per se is the doctrine courts apply when changing a common law negligence action into a more pro-plaintiff action based on the presence of a focused statute.[81] Because there was no preexisting negligence action, the "negligence per se" label was technically incorrect. The misuse of this terminology tends to gloss over the important fact that the court created a new tort action.

Substantively, however, it is appropriate to treat mandatory statutory duties as affecting the common law in the same way, whether or not a common law negligence action previously has been or now would be allowed without a statute.[82] Furthermore, regardless of the label, when

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Con-Teena, Inc., where the court found that plaintiff's complaint

> was drafted to state a cause of action for negligence *per se* for violation of ORS 471.131(1), rather than as a cause of action for ordinary common law negligence. It may be that the allegations of the complaint are sufficient to state such a cause of action. Because, however, the complaint appears to have been drafted on a theory of negligence for violation of the statute and because we believe that it states such a cause of action . . . we prefer not to decide in this case whether or not such allegations may also be sufficient to state a cause of action for common law negligence.

284 Or. 351, 354, 587 P.2d 75, 76 (1978).

Another area where statutory duty actions are mislabelled "negligence per se" is dog bite cases. *See, e.g.,* Jensen v. Feely, 691 S.W.2d 926, 928 (Mo. Ct. App. 1985); Miller v. Hurst, 448 A.2d 614, 618 (Pa. Super. Ct. 1982).

See also Wright v. Moffitt, 437 A.2d 554 (Del. 1981); Sagebrush, Ltd. v. Carson City, 660 P.2d 1013 (Nev. 1983).

81. *See supra* note 7.

82. Some courts do treat mandatory focused statutes as creating stricter standards of care both where a common law negligence action already exists and where it does not, but apply different stricter standards of care in the two situations. For example, the Oregon Supreme Court applies a prima facie evidence of negligence standard of care to cases involving focused statutes in which a common law negligence action already exists. *See* Freund v. DeBuse, 264 Or. 447, 506 P.2d 491 (1973); Barnum v. Williams, 264 Or. 71, 504 P.2d 122 (1972).

In contrast, when a mandatory focused statute is used as the basis of a new tort action, the standard of care is strict liability. This use of a more stringent standard of care in statutory duty cases than in cases involving similar mandatory statutes when common law negligence already exists is hard to justify.

In addition, the Oregon Supreme Court has labelled these statutory duty actions implied statutory torts. *See* Humbert v. Sellars, 300 Or. 113, 708 P.2d 344 (1985); Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983). An implied statutory tort is a tort action which the legislature actually intended to create, but failed to expressly provide for it. *See supra* notes 27-28 and accompanying text. Such actions are exceedingly rare. In both *Nearing* and *Humbert*, there is little evidence that the legislature actually thought about a tort action and intended to provide for one. It appears that the Oregon court is attributing new tort actions to the legislature which are actually common law statutory duty actions. The District of Columbia recently was presented with the opportunity to apply a similar implied statutory tort analysis to a statutory duty case. In Rong Yao Zhou v. Jennifer Mall Restaurant, 534 A.2d 1268 (D.C. 1987), discussed *supra* in the

a common law tort action's mandatory duty was derived from a focused statute, the standard of care should be consistently higher than mere negligence. A higher standard provides appropriate deference to the legislative decision to strictly prohibit the defendant's conduct. The higher standard of care will make it more difficult for the jury to conclude that the defendant's conduct was not culpable.[83] Therefore, the court's use of its negligence per se standard of care in *Zhou* is sounder than its use of the ordinary negligence standard of care in *Turner*, and should be applied in all mandatory statutory duty cases arising in the District of Columbia.[84]

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text accompanying note 76, the court said the following:

> Incorporating into the common law a standard of care set by a legislative enactment is distinct from determining that a cause of action arises, by implication, under a statute. The latter task is a matter of statutory construction, requiring the court to determine whether the legislature intended something other than that which it provided expressly. . . . Courts appropriately refrain from making such inferences except under certain narrowly defined circumstances. . . . By contrast, the decision to adopt from a penal statute a standard of care to be applied in determining common law negligence is "purely a judicial one, for the court to make". . . . Defining the contours of common law liability, including the duty that may have been breached in a negligence case, is a task traditionally within the purview of the judicial branch.

Id. at 1273-74.

Similarly, the Arizona Supreme Court rejected an implied statutory tort analysis in their case overruling the common law rule that a tavern owner owed no duty to a third party injured by a drunk driver. Ontiveros v. Borak, 667 P.2d 200 (Ariz. 1983). In *Ontiveros*, the court declared that there was both a simple common law negligence action and a negligence per se action against the tavern owner.

> The question before us is not whether the legislature established a statutory cause of action, but whether there is a "duty" or "obligation" imposed on the tavern owner. We believe that the portion of the statute forbidding the sale of liquor to an already intoxicated person was "enacted to protect members of the public who might be injured or damaged as a result of the intoxication which was aggravated by the particular sale of the alcoholic liquor". . . . We conclude, therefore, that the legislative enactment imposes an obligation upon tavern owners and that the particular obligation under consideration is one which was intended partly for the safety of others. We therefore recognize the duty described in that statute as a duty imposed by statute and adopted by the common law.

Id. at 210-11.

83. *See* HARPER, JAMES & GRAY, *supra* note 53, § 17.6, at pp. 621-22. The only courts which can justify routine selection of an ordinary negligence standard of care for mandatory and specific statutory duty cases are those who also refuse to treat specific mandatory statutes as anything more than evidence of negligence when a common law negligence action already exists. *See, e.g.*, Duplechain v. Turner, 444 So. 2d 1322, 1326 (La. Ct. App. 1984); Shatz v. TEC Technical Adhesives, 174 N.J. Super. 135, 415 A.2d 1188 (1980).

84. One possible explanation for the different standards of care used in *Zhou* and

2. Permissive Statutory Duties.—Treating similarly worded statutory duty language consistently, whether a common law negligence action existed, is also appropriate for the other category of cases involving focused statutes: those that used either permissive or vague general language. Even when a common law negligence action already existed, few commentators have addressed how courts should treat these types of statutes.[85] Some courts have recognized that, in regard to the applicability of the negligence per se standard of care, courts should treat mandatory statutes differently from either statutes that describe conduct very generally or statutes that use permissive language. For example, the Ohio Court of Appeals in *Swoboda v. Brown*[86] said:

> Where a specific requirement is made by statute and an absolute duty thereby imposed, no inquiry is to be made whether the defendant acted as a reasonably prudent man (sic), or was in the exercise of ordinary care. In such a situation, the obligation

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Turner is that *Zhou* involved a private defendant and the defendant in *Turner* was a governmental entity. A court could conclude that, although the public duty doctrine which precludes governmental liability in a large class of cases is inapplicable when a specific and mandatory statutory duty exists, the public policy of limiting the liability of governmental entities justifies applying a more pro-defendant standard of care to the conduct of governmental entities. If such a rationale was the basis for the use of different standards of care in *Zhou* and *Turner*, the court failed to note this anywhere in either opinion.

Such a distinction might run into difficulties under a particular state's tort claims act if the act was one which made public bodies liable for their torts to the same extent as private persons. For example, in Adam v. State the court said this about the public duty doctrine: "The state tort claims act provides that the State is liable 'in the same manner, and to the same extent as a private individual under like circumstances. . . .' § 25A.24. It clearly excludes the public duty doctrine." 380 N.W.2d 716, 724 (Iowa 1986).

In the federal context a recent Sixth Circuit decision, Schindler v. United States, 661 F.2d 552 (6th Cir. 1981), applied the reasoning of a number of earlier United States Supreme Court decisions interpreting the Federal Tort Claims Act. *See* United States v. Muniz, 374 U.S. 150 (1963); Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955). The Act's pertinent language says that the federal government can be sued "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The *Schindler* court interpreted this language as meaning the state's public duty doctrine could not bar an action based on violation of a federal statute. 661 F.2d at 559. States with similar tort claims act language may feel equally compelled to jettison distinctions between tort rules applied to public entities and private parties.

85. Many authorities seem to presume that courts will treat all focused statutes similarly, and that treatment will be whatever the negligence per se test is in the particular jurisdiction. *See* HARPER, JAMES & GRAY, *supra* note 53, § 17.6; PROSSER & KEETON, *supra* note 7, § 36; RESTATEMENT (SECOND) OF TORTS § 288A, B and § 874A comment e (1965).

86. 129 Ohio St. 512, 196 N.E. 274 (1935).

> and requirement has been fixed and established by law. . . . Where the standard of duty is thus fixed and absolute, it being the same under all circumstances, the failure to observe that requirement is clearly negligence per se. But, where duties are undefined, or defined only in abstract or general terms, leaving to the jury the ascertainment and determination of reasonableness and correctness of acts and conduct under the proven conditions and circumstances, the phrase "negligence per se" has no application.[87]

Courts which reject negligence per se when a focused statute has used generalized or permissive language are concluding that the appropriate standard of care is ordinary common law negligence. Thus, if a common law negligence action exists,[88] unlike negligence per se cases, the permissive statute does not affect the plaintiff's burdens of production or proof on the issue of reasonableness. Courts which use focused statutes to create new statutory duty actions also should prefer the ordinary negligence standard of care when the statutes' duty language is generalized or permissive.[89]

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87. *Id.* at 522, 196 N.E. at 276. *Accord* Dahle v. Atlantic Richfield Co., 725 P.2d 1069, 1073-74 (Alaska 1986).

> In order for a provision to be the basis of a negligence per se instruction, it must set forth a specific standard of conduct beyond that defined in a common law duty. . . . This provision is not the proper basis for a negligence per se instruction because it amounts to little more than a duplication of the common law tort duty to act reasonably under the circumstances.

Dahle, 725 P.2d at 1073-74.

88. However, these courts typically permit the statute to be admitted as a factor for the jury to consider on the issue of whether defendant acted reasonably. *See, e.g.*, Bachner v. Rich, 554 P.2d 430, 442 (Alaska 1976).

89. Courts which reject negligence per se when focused statutes use generalized or permissive language usually do not address specifically whether the statute affects the plaintiff's burden of showing that the risk was foreseeable. This is one situation where a preexisting common law action for negligence should result in applying a foreseeability test despite the presence of a focused statute.

When a common law action already exists, the permissive statute neither affects the standard of care as does negligence per se, nor is the source of the duty the same as in statutory duty actions. Therefore, the statute does not really change anything; it serves no independent function apart from the existing negligence action. In contrast, if no common law negligence action exists and the basis for creating one is the permissive statute, focus should preempt foreseeability because the court can only be basing the new action on the statute if the plaintiff and the risk of harm involved are those which the statute was enacted to cover. *See supra* note 63 and accompanying text.

In Dunlap v. Dickson, 307 Or. 175, 765 P.2d 203 (1988), the court stated that the negligence action was a common law action effectuating the permissive statute's intent. The court said: "We conclude that plaintiff may state a claim for common law negligence. This accords with legislative policy. . . . The legislature has enacted a statute . . . that

How courts treat generalized or permissive statutes when a common law action for negligence already exists is less important than how courts treat such statutes when there is no preexisting negligence action. In the former situation, a tort remedy exists regardless of how the court treats the statute. In the latter situation, the court must decide whether to allow a tort remedy. With generalized or permissive statutory duties, there is less impetus for courts to allow new tort actions even when these actions would aid in the accomplishment of a statute's purpose.[90] Nevertheless, in many cases the presence of the focused statute using permissive language will be an important factor in a court's decision to create a new action. If, but for the permissive statute, the court probably would not have created the new action, the court should note this and limit the scope of the duty to act reasonably to those persons and risks of harm which the legislature intended to cover.[91]

3. Statutes Using "Permit" or "Allow."—When the statutory language included "permit," or "allow," most courts use simple negligence's reasonableness standard of care.[92] "Permit" or "allow" are frequently used in statutes applicable to vehicle-livestock collision cases. These cases represent how courts typically treat such statutory language.[93]

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prohibits *permitting* livestock to run at large upon the highway. . . ." *Id.* at 181, 765 P.2d at 206 (emphasis added).

In a case like *Dunlap*, focus should preempt foreseeability if the court only created the tort action because of the existence of the focused permissive statute. If, on the other hand, the court would have created a negligence action even without a focused statute, the jury should determine foreseeability.

90. *See* Buckley, *supra* note 6, at 221; RESTATEMENT (SECOND) OF TORTS § 874A comment h(1) (1965).

91. In contrast, if the court would have created a new negligence action even if the statute had not existed, then the statute is not the basis of the new action's standard of care or anything else, and foreseeability should remain an element of plaintiff's chief case.

92. *See infra* note 102 and accompanying text.

93. A statutory duty area where statutes and ordinances often use "permit," "allow," or similar discretionary language is off-premises dog bite cases. However, instead of allowing simple negligence actions, many courts mislabel their new action based on the statutory duty "negligence per se."

The following ordinance is typical:

> (a) The following acts or conditions are hereby declared to be public nuisances, and it shall be unlawful for any owner or custodian of an animal to cause, suffer, permit, keep or maintain any such nuisance;
>
> (1) An animal, other than a cat of a species felis catus, found running at large, or which has run at large on two or more occasions.

SALEM OR., R.C. 91.015(a)(1). The Oregon Supreme Court, in Lange v. Minton, 303 Or. 484, 738 P.2d 199 (1987), based an action by a boy who was bitten by defendant's dog on the permissive language of this ordinance. They labelled the action "negligence per se" even though prior to this decision no common law negligence action was available

The original United States common law rule in vehicle-livestock collisions was that the owner of the livestock owed no civil duty to prevent the animal from wandering onto the roadway "unless he [had] knowledge of the vicious propensities of the animal or unless he should reasonably have anticipated that injury would result from its being so at large on the highway."[94] Until the mid-twentieth century, courts concluded as a matter of law that a plaintiff could not recover in livestock-motorist collisions.[95] More recently, the common law rule has changed. Owners of livestock now owe a duty to prevent their animals from straying onto the roadway unless there is a statute to the contrary.[96] Often the courts' basis for finding this duty is a fencing-in statute.[97]

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to a person bitten by a dog which was running at large. *See also* Kathren v. Olenik, 46 Or. App. 713, 719-20, 613 P.2d 69, 75 (1980); Jensen v. Feely, 691 S.W.2d 926, 928 (Mo. App. 1985); Alex v. Armstrong, 385 S.W.2d 110, 114 (Tenn. 1964).

94. 4 AM. JUR. 2D *Animals* § 114 p. 364 (1962). *Accord* Annotation, *Liability of Owner of Animal For Damages to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R. 4th 431, 439 (1984). *See also* Eixenberger v. Belle Fourche Livestock Exch., 75 S.D. 1, 58 N.W.2d 235, 237 (1953); Fox v. Koehning, 190 Wis. 528, 209 N.W. 708 (1926), *overruled,* Templeton v. Crull, 16 Wis. 2d 416, 114 N.W.2d 843 (1962).

95. *See, e.g.,* Fox v. Koehnig, 190 Wis. 528, 209 N.W. 708, 713 (1926). The court concluded:

> [T]he conduct of the horse in running into the automobile in the instant case was a most unusual and unnatural occurrence. It was not the usual conduct of a horse. It was an accident not within the field of reasonable anticipation. It therefore follows that, even if the defendant may have been guilty of a want of ordinary care in failing to maintain a more secure fence around his barnyard, his failure in such respect was not the proximate cause of the damages sustained by plaintiffs.

Id. See also Annotation, *supra* note 94, at 447.

96. *See, e.g.,* Templeton v. Crull, 16 Wis. 2d 416, 114 N.W.2d 843 (1962) (overruling Fox v. Koehnig, 190 Wis. 528, 209 N.W. 708 (1926) (discussed *supra* note 95)).

HARPER, JAMES & GRAY, *supra* note 53, at 258-59, says:

> Several of these states passed "fencing out" statutes. But times and conditions changed and the advent of large cities, heavily populated areas, thickly settled agricultural communities, and the development of important heavy industries, led a number of these states either to abolish or modify the rule permitting cattle to run at large.

For a discussion of similar experience in Canada, see Linden, *supra* note 19, at 59:

> The Ontario courts have utilized legislation making it unlawful for animals to roam the highways to create a duty of care on the part of their owners where at common law none existed. These cases accepted the view that no duty was owed at common law, but manufactured a legislative intention to create civil liability. After the statute was amended in 1939 matters became rather confused until the Supreme Court of Canada finally held that a duty to use reasonable care with regard to animals on modern highways exists independently of any legislation.

97. *See, e.g.,* Dunlap v. Dickson, 307 Or. 175, 765 P.2d 203 (1988).

Therefore, some of the vehicle-livestock accident cases in which courts created new negligence actions are statutory duty cases.[98]

The "fencing in" statutes typically make it unlawful to "permit" or "allow" livestock to run at large on highways.[99] Most courts presented with violations of these statutes have provided a negligence cause of action for the injured motorist.[100] Conversely, where livestock-motorist accidents occurred in jurisdictions governed by "fencing-out" statutes that allow livestock to run at large, the statutes were often the basis for denying civil liability entirely.[101]

Courts' reliance on permissive statutes in livestock-motorist cases as the source of a standard of reasonable care, rather than strict liability

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98. If the court would have created a negligence action even without the presence of the focused statute, it would not be a statutory duty action. In most of the vehicle-livestock collision cases it is unclear whether a negligence action would have been created regardless of the existence of the statute.

99. *See, e.g.,* OR. REV. STAT. § 607.145(1) (1989): "No person owning or having the custody, possession or control of an animal of a class of livestock shall permit the animal to run at large . . . in a livestock district in which it is unlawful for such class of livestock to be permitted to run at large."

100. *See, e.g.,* Hammarlund v. Troiano, 146 Conn. 470, 152 A.2d 314, 315 (1959); Gardner v. Black, 217 N.C. 573, 9 S.E.2d 10 (1940); Parker v. Reter, 234 Or. 344, 383 P.2d 93 (1963); Rice v. Turner, 191 Va. 601, 62 S.E.2d 24, 26 (1950); Hinkle v. Siltamaki, 361 P.2d 37, 41 (Wyo. 1961). *But see* Cosby v. Oliver, 265 Ark. 156, 577 S.W.2d 399, 401 (1979) (rebuttable presumption of negligence); Peterson v. Pawelk, 263 N.W.2d 634, 637 (Minn. 1978) (negligence per se). The tortured analysis in *Peterson* illustrates the problem a court faces when it does not distinguish between mandatory and permissive statutes in its application of negligence per se. When a statute is mandatory, proof of its violation usually results in negligence per se being some form of strict liability. *See supra* notes 68-69 and accompanying text. Negligence per se is found to mean something different in *Peterson*:

> [V]iolation of the statute of negligence per se; thus, if the violation is the proximate cause of injury to another, the person violating the statute is liable for the resulting damage unless the violation is excusable or justifiable under the circumstances of the case. Moreover, the burden of proving excuse or justification is upon the owner. . . . The meaning of the word "permit" as used in the statute . . . clearly negates a legislative intent to impose strict liability on the owner of an animal running at large. . . . Under the evidence, whether defendant . . ., by his conduct, gave the bull an opportunity to run at large or made it possible for him to do so would have been a jury question.

263 N.W.2d at 637. For the plaintiff to benefit from negligence per se he must first show that defendant "gave the bull an opportunity to run at large or made it possible for him to do so." *Id.* This sounds very much like the plaintiff must show the defendant acted unreasonably; therefore, it would seem that negligence per se in no way aids plaintiff's case.

101. *See, e.g.,* Kendall v. Curl, 222 Or. 329, 353 P.2d 227 (1960), which said:

> The legislature has said that stock may range at large on the highways of Umatilla County. . . . If cattle and horses have a right to be on the road, their owner is not negligent in allowing them on the road. . . . There being no duty, there is no breach of a duty, hence no fault, and no liability.

or negligence per se, is entirely appropriate. The following statement in the North Carolina decision, *Gardner v. Black*,[102] provides the usual rationale: "Such a statute as this relating to allowing or permitting livestock to run at large, 'implies knowledge, consent, or willingness on the part of the owner that the animals be at large, or such negligent conduct as is equivalent thereto.'"

Based on such an interpretation of "permit" or "allow," a more demanding standard of care is unjustified. Most statutes using permissive language involve owners of animals or custodians of other people.[103] Because of the difficulty in controlling the actions of an animal or another person, negligence is the appropriate standard of care.

B. The Use of "May" and its Special Applicability to Governmental Bodies

The other statutory language upon which some courts base ordinary negligence actions is "may." The discretion this word implies justifies courts' conclusion that choosing whether to engage in the described conduct only should result in liability if the plaintiff proved the act or failure to act was unreasonable under the circumstances.[104] By far, the greatest number of statutes using the permissive "may," instead of the mandatory "shall," apply to government bodies. Actions against governmental defendants present special problems, particularly when the focused statute is permissive.

While governmental immunity has been statutorily abolished for the most part, various doctrines make it difficult to sue government entities in tort. One major obstacle is the public duty doctrine. This common law doctrine provides that "the duty imposed on state agencies and public officials is one owed to the public generally, and breach of this

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102. 217 N.C. 573, 577, 9 S.E.2d 10, 12 (1940). *Accord* Parker v. Reter, 234 Or. 533, 549, 383 P.2d 69 (1963); Pongetti v. Spraggins, 215 Miss. 397, 61 So. 2d 158 (1952).

103. *See, e.g.*, OR. REV. STAT. § 421.165(3) (1989) ("The Department of Corrections shall adopt rules to *permit* an inmate confined in a Department of Corrections institution to be granted temporary leave from the institution."); OR. REV. STAT. § 426.680(1) (1989) ("The superintendent of the facility designated . . . to receive commitments for medical or mental therapeutic treatment of sexually dangerous persons may *grant* a trial visit to a defendant committed as a condition of probation.") (emphasis added).

104. For example, in Bauer v. Southwest Denver Mental Health Center, Inc., 701 P.2d 114 (Colo. Ct. App. 1985), the Colorado Court of Appeals refused to apply its negligence per se standard because the statute involved used the discretionary "may" instead of the mandatory "shall." The court said: "In order for an actionable claim of negligence *per se* to arise, the statute in question must prohibit or require a particular act." *Id.* at 118.

duty does not provide an individual with a cause of action."[105] Simply put, because a duty is owed to all, it is owed to none. The state and its subdivisions owe no duty to render assistance unless, in addition to there being a focused statute, a special relationship existed between the state and the injured party.[106]

Even where the public duty doctrine is no longer the rule,[107] there are two further hurdles the plaintiff may have to overcome when statutes use the permissive "may": duty versus power; and discretionary/planning versus ministerial/operational. The Iowa Supreme Court's 1986 decision, *Adam v. State*, discussed both doctrines.[108]

In *Adam*, the state was liable for economic harm the plaintiff grain producers suffered because the Iowa State Commerce Commission (ICC) negligently licensed and inspected a grain elevator whose owners sub-

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105. State v. Superior Court of Maricopa County, 123 Ariz. 324, 599 P.2d 777, 785 (1979), *overruled*, Ryan v. State, 132 Ariz. 308, 656 P.2d 597 (1982). *See infra* note 109.

106. The Arizona Supreme Court described this doctrine in State v. Superior Court of Maricopa County, 123 Ariz. 324, 599 P.2d 777 (1979), *overruled*, Ryan v. State, 132 Ariz. 308, 665 P.2d 597 (1982). This case involved a class action on behalf of depositors of various insolvent thrift associations against the Arizona Corporation Commission for economic harm suffered because the Commission failed to fulfill various regulatory duties. The court explained that the traditional common law rule treated the state's duty as owed to the general public, and that breach did not result in liability to injured individuals. *Id.* at 785. *Accord* 2 COOLEY, TORTS 385 (4th ed.); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 823 (1981).

The court in *Superior Court of Maricopa County* added that under the public duty doctrine, a statute would not be the source of a duty of care in tort unless the "obligation owing to the general public [was] narrowed into a specific duty to an individual." 665 P.2d at 785. The Arizona court found a special relationship in this case and therefore allowed a tort action even though the language of some of the focused statutes was permissive.

107. The public duty doctrine has been widely criticized. *See, e.g.,* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 458-59, § 25.06 (1958); PROSSER & KEETON, *supra* note 7, at 1049-50. The modern trend is to reject it entirely. *See, e.g.,* Leake v. Cain, 720 P.2d 152 (Colo. 1986); Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987); Adam v. State, 380 N.W.2d 716 (Iowa 1986); Maple v. City of Omaha, 222 Neb. 293, 384 N.W.2d 254 (1986); Brennan v. City of Eugene, 285 Or. 401, 591 P.2d 719 (1979); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976). *But see* Everton v. Willard, 468 So. 2d 936 (Fla. 1985).

In 1982, the Arizona Supreme Court overruled State v. Superior Court of Maricopa County, in Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982), and held that it would "no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery." 656 P.2d at 599. The court completely abandoned the public duty doctrine, concluding "the parameters of duty owed by the state will ordinarily be coextensive with those owed by others." *Id.*

108. 380 N.W.2d 716 (Iowa 1986).

sequently went bankrupt. There was no preexisting common law tort action.[109] One of the bases for the suit was a permissive statute which provided that the ICC "may" inspect grain dealers.[110] Another statute provided that "'may' confers a power rather than a duty."[111] The court noted that when a power is created rather than a duty, there is no requirement that the state act and that, therefore, there can be no liability for failure to act.[112] However, once the state exercised that power, "it had a responsibility to act with due care."[113]

Denying a statutory duty action unless the state exercised its power by acting affirmatively, even though it was not required to, has its roots in the treatment of voluntary assumption of duty by affirmative conduct, most commonly described as the "Good Samaritan" doctrine.[114] Under this doctrine, a stranger has no duty to assist a person in difficulty or peril. Once the stranger affirmatively acts, liability will exist if the acts are negligent and result in harm to another. When a statute merely creates a power in the state to act, the state is viewed as having the role of the stranger who is under no obligation to act and is liable only if action is taken which negligently injures someone.

The distinction between a duty and a power will not always be determinable by the presence of "shall" instead of "may." As one

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109. *Id.* at 720.

110. IOWA CODE § 542.9 (1989).

111. IOWA CODE § 4.1(36)(c) (1989).

112. *Adam*, 380 N.W.2d at 723.

113. *Id.* In *Adam*, the harm suffered was purely economic. Economic harm is one of the classic "no duty" categories at common law. *Adam* illustrates how a court can use a focused statute to justify creating a tort action when, without the statute, the action would not be permitted. The principled basis for creating the action is that the court finds that the statute was intended to prevent economic harm and effectuates this purpose by creating a statutory duty action to remedy this harm. *Accord* Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983) (a statutory duty action for purely emotional harm).

114. Typically, unless there is a special relationship between the parties, defendant has no duty to rescue plaintiff from harm caused by sources independent of defendant's control. This is illustrated by the lack of a stranger's duty to rescue another person who is drowning even if the stranger is standing next to a life preserver which he fails to throw to the drowning person. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965).

The "Good Samaritan" doctrine, which allows liability if a stranger acts affirmatively, is an exception to this heartless rule. *See* PROSSER & KEETON, *supra* 7, at 378-82.

RESTATEMENT (SECOND) OF TORTS § 323 (1965) describes the doctrine as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

See also RESTATEMENT (SECOND) OF TORTS § 324A (1965).

commentator notes: "[S]tatutes inevitably do vary enormously in the extent to which the obligations they impose involve scope for the exercise of judgment and discretion, and the distinction between 'power' and 'duty' will always be to some extent a matter of degree."[115]

When an action is based on allegedly negligent conduct under a permissive statute, most state tort claims acts create the further issue of whether the conduct was an immune discretionary/planning decision.[116] This issue was raised in *Adam* and the court held that, despite the permissive nature of the statute, the negligent conduct did not involve "policy considerations."[117] "The policy-planning decisions were made by the legislature in enacting the . . . act."[118] The discretionary versus ministerial issue may also arise when a statute's language is mandatory, although it will be much less likely that the governmental conduct will be found to involve an immune discretionary decision.[119]

In summary, where a governmental entity is the defendant, there are certain doctrines that merit examination before a court decides to create a new tort action based on a statutory duty. In addition to finding the statute focused, it is necessary to determine whether the jurisdiction still applies the public duty doctrine and, if so, whether there was a specific duty which created a special relationship that excepted the action from the doctrine. The special relationship exception is more likely found when the statute uses mandatory language.

If the case comes within the special relationship exception, or the court has rejected the public duty doctrine, it is then necessary to determine whether the statute creates a duty or only a power. If the statute is permissive, a court is likely to treat it as merely providing a power, and to allow a new tort action only when the governmental entity has, in fact, exercised the power. Finally, especially when the statute is permissive, courts should examine whether the defendant's conduct involved discretion or was merely ministerial. Tort claims acts

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115. Buckley, *supra* note 6, at 221.

116. *See generally* PROSSER & KEETON, *supra* note 7, at 1062. *See also* RESTATEMENT (SECOND) OF TORTS § 895D (1979).

117. 380 N.W.2d at 726.

118. *Id.* at 725. *Accord* Brennen v. City of Eugene, 285 Or. 401, 591 P.2d 719 (1979). *See also* Nordbrock v. State, 395 N.W.2d 872 (Iowa 1986) (court dismissed tort action against the state by shareholders of a bank that became insolvent for its negligence in bank examinations and supervision because the court found that the conduct involved discretionary/planning decisions).

119. This question has been discussed extensively in cases brought under the Federal Tort Claims Act, 28 U.S.C. § 2680(a). *See, e.g.,* Berkovitz by Berkovitz v. United States, 108 S. Ct. 1954, 1963 (1988); Schindler v. United States, 661 F.2d 552, 555-57 (6th Cir. 1981); Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974).

usually authorize the creation of a new tort action only if the conduct is determined to be ministerial.

C. *The Effect of the Doctrine of No Right Without A Remedy on Statutory Duty Analysis*

The next section addresses what effect the venerable doctrine of *ubi ius ibi remedium* (no right without a remedy) should have on a state court's decision to create a new tort action based on a statutory duty.

In fifteenth century England,[120] and probably even nineteenth century America,[121] the existence of a focused statute made a court's job easy. Sir Edward Coke's commentary on the Magna Carta said that "every Act of Parliament made against any injury, mischief, or grievance doth either expressly, or impliedly give a remedy to the party wronged,"[122] and was the source of the "no right without a private remedy" doctrine.[123] It enabled courts to provide a new tort action whenever a statutory duty was breached. Although it has sometimes been described as a maxim of statutory construction,[124] this doctrine has been much too influential for mere maxim. It was the source of remedies clauses in 35 state constitutions.[125] Furthermore, it has been the nonconstitutional source of statutory actions in numerous cases.[126]

The "no right without a remedy" doctrine has been the basis for English "statutory negligence" actions[127] and federal implied rights of actions.[128] The source of both types of action is said to be the legislature. However, if what is meant by "source" is that the legislature impliedly intended to create these actions, this claim is pure fiction. It is incorrect

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120. Prior of Bruton v. Ede, Y.B. Pasch. 10 Edw. 4, fo. 31, pl. 7 (Q.B. 1470), *reprinted in* 47 Selden Society 31 (N. Neilson ed. 1931).

121. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154-73 (1803).

122. E. COKE, SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (1642).

123. *See* Foy, *supra* note 28, at 524-25; Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 38 (1986).

124. "One maxim is *Ubi ius ibi remedium*, suggesting that if the legislation created a right it must have been intended to create an adequate remedy to enforce that right." RESTATEMENT (SECOND) OF TORTS § 874A comment c (1979).

125. Schuman, *supra* note 49, at 40; Note, *State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies*, 64 WASH. L. REV. 203, 204 (1989); Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150, 170 (1984).

126. *See, e.g.*, Foy, *supra* note 28, at 556 n.234.

127. Fricke, *The Juridical Nature of the Action Upon the Statute*, 76 L.Q. REV. 240, 243 (1960).

128. *See, e.g.*, Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916).

to describe the doctrine as legislative.[129] As one commentator noted, even in Coke's time, "the right to maintain a private action under a statute did not depend on the text of the statute or the demonstrable intentions of Parliament. The implied right of action depended instead upon a general legal principle extrinsic to the legislation itself."[130] "No right without a remedy" has been, since its inception, a judicial doctrine allowing courts to do what is equitable.[131]

When the doctrine has been found applicable, most courts have not distinguished between statutes which are purely declaratory and those that provide criminal or administrative penalties.[132] However, a few jurisdictions, most notably England, expressly prefer to provide a civil action when a statute does not provide any penalty.[133] The English rationale for this distinction is not tied explicitly to "no right without a remedy." Instead, the English courts claim that when the legislature provides some form of sanction, it is intended to be the exclusive sanction. In contrast, where the legislature provides no sanction, it intended that

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129. An exception to this assertion arguably may exist in the few jurisdictions where a statute such as the one set out below is in effect: "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." 23 OKLA. STAT. tit. 23, § 3 (1981), *see* N.D. CENT. CODE § 32-03-01 (1989). *See also* CAL. CIV. CODE §§ 3281, 3282 (1989). *See supra* note 49.

Where such a statute exists, every injury to a person or property as a result of violation of a focused statute may be viewed as requiring a tort remedy. In regard to such a statute one court has said: "It does not create any duties but only provides for a remedy should an established duty be breached." Butts Feed Lots, Inc. v. United States, 690 F.2d 669 (8th Cir. 1982). However, like jurisdictions which have remedies clauses in their constitutions, see *infra* note 127 and accompanying text, jurisdictions with these statutory remedies provisions have not developed any doctrine for routinely using them as the basis for tort actions. *But see* CAL. EVID. CODE § 669 (1967) *discussed in* Holdych, *The Presumption of Negligence Rule in California: The Common Law and Evidence Code section 669*, 11 PAC. L.J. 907 (1979-80) *cited with approval in* Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800, 806 n.9 (1984).

130. Foy, *supra* note 28, at 528.

131. In addition, in many states it is provided for in the state constitution. Nevertheless, a theory of constitutional duty actions analogous to statutory duty actions has, so far, not been developed. *See* Schuman, *supra* note 49, at 70.

132. Foy, *supra* note 28, at 527; RESTATEMENT (SECOND) OF TORTS § 874A (1979).

133. *See* Doe d. Bishop of Rochester v. Bridges, 1 B. & Adol. 847, 859 (1831), in which the court said that

> where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.

See also Buckley, *supra* note 6, at 214-21.

the courts provide a civil remedy.[134] Any discussion of legislative intent as a rationale for distinguishing between statutes which provide a sanction and those that do not is usually yet another fiction.

Under the "no right without a remedy" principle, it is dubious whether the provision of a criminal or administrative penalty is a remedy for injured individuals. Nevertheless, there appears to be a tendency, even among American courts, to create a statutory duty action when the statute is purely declaratory and to deny such a remedy when the statute provides a criminal sanction. For example, in Oregon there are two cases whose different outcomes may be based on the declaratory versus criminal or administrative sanction distinction.

In 1978, the Oregon Supreme Court refused to create a statutory duty action for plaintiff children against their mothers who had abandoned them in violation of a mandatory criminal statute.[135] Yet, in 1983, the same court created a statutory duty action for a plaintiff who sued police officers for failing to arrest her husband who had physically threatened her at home in violation of a restraining order.[136] The statute upon which the action was based was a purely declaratory mandatory arrest statute. Even though the court did not use "no right without a remedy" language, it was probably an important factor in providing a new tort action.[137]

Under the principle of "no right without a remedy," no valid basis exists for preferring statutory duty actions when a statute is declaratory. When no private remedy is available under either common law or the statute, courts should accord the same weight to this principle for both types of statutes. Other justifications for preferring actions when a statute is declaratory are equally dubious. The legislature will have rarely decided the question of whether civil liability should be available unless it does so expressly.

One commentator used the statutory purpose argument as the basis for concluding that declaratory statutes "provide the strongest case for implying a private cause of action."[138] He argued that the new tort action "may be the only means to carry out the legislative intent."

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134. *See* Cutler v. Wandsworth Stadium, A.C. 398, 407 (1949); Phillips v. Britannia Hygenic Laundry Co., [1923] 2 K.B. 832, 838.

135. Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105 (1978).

136. Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983). In *Nearing*, the action created appears to be a statutory duty action although the court seems to treat it as an implied statutory tort. *Id.* at 711-12, 670 P.2d at 143-144.

137. *Id. See also* Cain v. Rijken, 300 Or. 706, 717 P.2d 140 (1986) (created a statutory duty action based on a permissive declaratory statute). *See generally* Schuman, *supra* note 49, at 70.

138. Comment, *Implied Causes*, *supra* note 16, at 1254.

However, as another commentator pointed out: "Prescriptions unsupported by penalties are usually instructions of an essentially administrative nature, often addressed to public bodies. The grafting of civil liability in tort upon such provisions is likely to give rise to considerable practical difficulties and may also involve defiance of (various) policy factors."[139] Creating a statutory duty action based on a declaratory statute may often *defeat* the legislative purpose.[140]

In cases involving both declaratory statutes and statutes with penalties, courts should examine the legislative purpose in enacting the statute and determine whether the creation of a new tort action would better effectuate that purpose. Consideration of whether the statute is purely declaratory occasionally may provide some guidance in determining this question.[141]

D. Responsible Judicial Lawmaking

Statutory duties raise particularly troublesome questions about who makes law and who should make law. Statutory duty cases are often what Ronald Dworkin calls "hard cases."[142] By definition, they involve situations in which the issue is either one of first impression or one in which courts previously have declared no duty was owed and, therefore, no tort remedy was available. In statutory duty cases, courts must decide whether the presence of a focused statute should influence them to change the common law. When the case presents a new fact pattern to the court, the effect of the statute may be less obvious than when a court is asked to overrule previous case law. Nevertheless, in both situations courts are not asked merely to correct the lower courts' errors in applying the existing law; courts are asked to make law.

How should courts make new law? Many judges, attorneys, and commentators shrink at the use of words like "make" and "create" to describe the role judges play in the legal system. They maintain that a

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139. Buckley, *supra* note 6, at 217.

140. *See, e.g.,* Burnette v. Wahl, 284 Or. 705, 712, 588 P.2d 1105, 1109 (1978) which said:

> If there is any chance that invasion into the field by the court's establishment of a civil cause of action might interfere with the total legislative scheme, courts should err on the side of non-intrusion because it is always possible for the legislature to establish such a cause of action if it desires. Courts have no omnipotence in the field of planning, particularly social planning. . . . Courts should exercise restraint in fields in which the legislature has attempted fairly comprehensive social regulation.

141. See Comment, *Implied Causes*, *supra* note 16, at 1254-59 for a thorough discussion of the various competing factors that go into determining whether a new tort action would better carry out the legislative purpose.

142. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

judge's role is limited to finding and applying the law the legislative and administrative branches have created.[143] Statutory duty cases are effective vehicles for challenging this view because they force courts to consider their role in the lawmaking process.

Asserting that courts create statutory duty actions does not mean that legislative intent is irrelevant.[144] It is very relevant if the meaning of "legislative intent" is not limited to the issue of whether the legislature intended to create a tort action. Almost certainly the legislature, as opposed to individual legislators, did not consider, much less decide, this issue. The best posture a court can take is to assume there was no legislative decision concerning tort liability unless there is evidence to the contrary.[145]

If legislative intent includes consideration of what social or, sometimes, private good[146] the legislature intended to accomplish by enacting a statute, it is indeed relevant to a judge's consideration of a statutory duty. In deciding whether to create a new tort action when a focused statute is present, a court should examine the legislature's purpose or purposes for enacting the statute. Its decision to create a new action

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143. *See, e.g.,* Donaca v. Curry County, 303 Or. 30, 35-36, 744 P.2d 1339, 1342 (1987); England, 9 J. LEGAL STUD. 27 (1980). They disapprove of the legal methodology and language of judges such as former California Supreme Court Justice Traynor who made new law in such cases as State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (intentional infliction of emotional distress) and Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (strict liability for products liability). They find especially inappropriate any discussion of making law based on policy considerations. *See, e.g.*, Walker v. Bignell, where the court said:

> Instead we prefer to declare directly that, as a matter of public policy, municipalities should not be exposed to common law liability under the circumstances present in this case. Exposure to such liability would, we feel, place an unreasonable and unmanageable burden upon municipalities such as the defendants herein.

100 Wis. 2d 256, 301 N.W.2d 447, 453 (1981).

144. Some commentators believe that there is no such thing as a discernible legislative purpose or intent. Federal Circuit Court Judge Easterbrook says:

> [J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses. . . . Moreover, because control of the agenda and logrolling are accepted parts of the legislative process, a court has no justification for deciding cases it thinks the legislature would in their absence.

Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 548 (1983).

145. *See* Bob Godfrey Pontiac v. Roloff, 291 Or. 318, 342, 630 P.2d 840, 854 (1981) (Linde, J., concurring).

146. *See* Posner, *Economics, Politics, and Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265, 279 (1982). *See also* O.W. HOLMES, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 107-09 (H. Shriver ed. 1936).

should be based on these legislative purposes if they are sufficiently determinable.[147] However, in creating or rejecting a new tort action as a means of carrying out the legislature's purpose, a court should not attribute this to the legislature and thereby disclaim judicial responsibility for what is clearly a judicial act.

When examining the purpose of a statute, a court might benefit from Justice Felix Frankfurter's analysis of statutory purpose at the federal level.[148] He asserted that a court's function is to "decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations."[149] Frankfurter was faced with a problem that state courts do not have: the *Erie* doctrine and other judicially imposed limitations on making federal common law.[150] These limitations on the federal courts' creative powers led Frankfurter and others[151] to attempt to attribute the source of private rights of action to Congress, even though Congress had not expressly provided for them. During Frankfurter's time, the Supreme Court's analysis was based on its claim that Congress knowingly had delegated to the courts the power to provide civil remedies for violations of federal statutes.[152]

State courts do not need to resort to such fictions.[153] They have the power to make common law. The search for legislative purpose is still

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147. Judge Posner believes that whether it is called legislative intent, motive or purpose, what the legislature would prefer will often be beyond the capacity of judges to determine. Posner, *supra* note 146, at 272-73.

148. *See, e.g.,* Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 255 (1951) (Frankfurter, J., dissenting); Board of Commissioners v. United States, 308 U.S. 343, 349 (1939).

149. *Montana-Dakota Utilities Co.*, 341 U.S. at 261.

150. With the exception of the years in which J.I. Case Co. v. Borak, 377 U.S. 426 (1964) was the controlling law, the Court has viewed itself as not possessing the power to create federal remedies based on federal statutes. Since Cort v. Ash, 422 U.S. 66 (1975) replaced *Borak* as the rule on private remedies, "[t]he Court has retreated from the notion, central to *Borak*, that the federal judiciary has inherent power to create private remedies for statutory violations absent a contrary congressional intent. Instead, the Court now treats the implication of private rights of action as a matter of statutory construction." Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 562 (1981).

151. *See, e.g.,* J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See generally* Foy, *supra* note 28, at 558-62.

152. Tunstall v. Brotherhood of Locomotive Fireman & Enginemen, 323 U.S. 210, 213 (1944).

153. And neither do the federal courts. Today's much more conservative and, in my view, honest view of federal implied rights of action does not mean that injuries resulting from violations of federal statutes and regulations are without a remedy. However, the source of that remedy is state court application of state tort doctrine to the federal statutes.

At least one commentator believes this is a bad thing. *See* Foy, *supra* note 28, at

appropriate, but not because the legislature expects the judiciary to effectuate this purpose by providing a civil action. Instead, judicial determination of the legislature's purpose for creating a statutory duty enables the court to exercise its common law powers to create or deny a new action responsibly.[154]

E. Proposed Analysis and Conclusion

Based on the previous discussion of statutory duty issues, the following analytical framework for dealing with statutory duties and their close relative, negligence per se, is proposed.

Whether a common law negligence action already exists, the first issue a court should resolve is focus. If a court determines that the plaintiff and the risk of harm that resulted in the plaintiff's injury are within the core of what the legislature intended to cover, the court should find the statute applies to the plaintiff's case. This finding of focus eliminates the jury's usual role of determining foreseeability.[155]

The court then should carefully investigate what purpose the statute was intended to serve. Determination of focus assists in resolving this question, but the court should inquire further as to whether the legislation itself already satisfies the legislature's goal of protecting certain people from certain risks of harm. If the creation of a new remedy or the strengthening of an existing remedy would better carry out the legislative purpose, the court should create a statutory duty or negligence per se action. It should be especially cautious in going forward with a statutory duty action when prior common law denied such an action. Usually, sound public policy reasons exist for common law "no duty" rules. The

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571. I disagree. Using a federal statutory duty as the basis of a tort action in state court is no more problematic than using a state statutory duty. If this results in lack of uniformity among jurisdictions, it is certainly no greater than that which exists in almost all areas of tort law.

Meanwhile, injured parties will be provided with some form of remedy if a remedy would help effectuate the purpose of the legislation.

154. An example of a situation where courts have held that a focused statutory duty should not be the basis for a new tort action is where the defendant in a lawsuit seeks to sue the attorney for the plaintiff in negligence for having brought an unwarranted action. In a number of states, such an action has been unsuccessfully sought based on violations of the state's Code of Professional Responsibility. *See, e.g.,* Nelson v. Miller, 227 Kan. 271, 607 P.2d 438, 451 (1980); Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977).

The court in *Nelson* justifies its refusal to create such an action by asserting that to do so would thwart the Code's purpose of encouraging zealous representation of clients. 607 P.2d at 451.

155. Except where a common law action already exists and the statute is merely permissive. *See supra* note 88 and accompanying text.

presence of a focused statute should cause the court to carefully reconsider such a rule.[156] However, the rule should be abandoned only if the court believes such a change is necessary to achieve the legislative purpose underlying the statute.

Once the court determines that a change in the existing law is merited, it should examine the mandatory or permissive statutory language. If the statute evidences an intent that the actor to whom it is addressed be given little or no discretion, a stricter action than negligence should be provided uniformly even though a common law negligence action already exists.[157] This action probably will be labeled "negligence per se." However, if no common law action exists, it is important that the court not hide behind the "negligence per se" label, but instead openly weigh the consequences of creating a new statutory duty action.[158]

When a focused statute is permissive, negligence typically should be the kind of action retained or created. When a negligence action already exists, the permissive statute should have no impact on the existing negligence action.[159] Where no common law action exists, the permissive statute should be the basis of a new statutory duty action for negligence in which the focus determination resolves foreseeability, but the jury determines reasonableness. It may be appropriate in both situations to allow the jury to consider the statute in its determination of whether the defendant acted reasonably; however, the burden of production and proof on this element should remain with the plaintiff.

A court's adoption of this proposed analysis will make the interrelationship of statutes and tort actions more coherent, certain, and honest. Courts still will face hard policy choices in deciding whether to create a statutory duty action. These choices will be especially difficult when a longstanding "no duty" area of the law is involved.

Application of the proposed analysis will not always result in a new tort action. Instead, it will encourage courts to more openly acknowledge

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156. For one court's method of deciding whether to overrule an existing common law decision, see G.L. v. Kaiser Found. Hospitals, Inc., 306 Or. 54, 59, 757 P.2d 1347, 1349 (1988), in which the Oregon Supreme Court said:

> Ordinarily this court reconsiders a nonstatutory rule or doctrine upon one of three premises: (1) that an earlier case was inadequately considered or wrong when it was decided, . . .; (2) *that surrounding statutory law or regulations have altered some essential legal element assumed in the earlier case*, . . .; or (3) that the earlier rule was grounded in and tailored to specific factual conditions, and that some essential factual assumptions of the rule have changed.

See also Note, *Oregon's Hostility to Policy Arguments: Heino v. Harper and the Abolition of Interspousal Immunity*, 68 OR. L. REV. 197 (1989).

157. *See supra* notes 68-69 and accompanying text.

158. Actually, it will most likely be some form of strict liability with limited defenses which will probably be labelled "excuses." *See* Forell, *supra* note 6, at 262.

159. *See supra* note 88 and accompanying text.

the extent of their role in making law when statutes are involved, and when courts make new law they will do so as a result of principled analysis rather than by judicial fiat.

A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants

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I. INTRODUCTION

Bar admission in most states includes some inquiry into applicants' mental and emotional fitness to practice law.[1] In theory, such an inquiry protects the public and the system from mentally and emotionally unfit practitioners. In practice, the effectiveness of this approach is open to serious question. Both the substance and process of current character and fitness inquiries have been subjected to pervasive and compelling criticism.[2] The strongest indictment to date has been framed by Professor Rhode.

> Politically non-accountable decisionmakers render intuitive judgments, largely unconstrained by formal standards and uninformed by a vast array of research that controverts the premises on which such adjudication proceeds. This process is a costly as well as empirically dubious means of securing public protection. Substantial resources are consumed in vacuous formalities for

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1. "Ninety percent of all bar applications include questions regarding mental health, such as involuntary (43%) or voluntary (39%) commitment to mental institutions, treatment or diagnosis of mental illness (27%), and treatment or diagnosis of emotional disturbance (12%)." Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 581 (1985). An inquiry into an applicant's mental health is one of four types of inquiries commonly made by character committees. Gerber, *Moral Character: Inquiries Without Character*, 57 B. EXAMINER, May 1988, at 13. The other three areas of inquiry are honesty and integrity, personal life, and loyalty to the American system of government. *Id.*

2. *See, e.g.*, Elliston, *Character and Fitness Tests: An Ethical Perspective*, 51 B. EXAMINER, Aug. 1982, at 8; Gerber, *supra* note 1; Huber, *Admission to the Practice of Law in Texas: A Critique of Current Standards and Procedures*, 17 HOUS. L. REV. 687 (1980); McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984); Rhode, *supra* note 1.

> routine applications, and nonroutine cases yield intrusive, inconsistent, and idiosyncratic decisionmaking. Examiners generally lack the resources, information, and techniques to predict subsequent abuses with any degree of accuracy. Only a minimal number of applicants are permanently excluded from practice, and the rationale for many of those exclusions is highly questionable.[3]

Professor Rhode has made a series of observations about mental and emotional fitness requirements. Individuals with histories of psychological treatment "clearly risk extended inquiries and delay, and in some instances, a possibility of exclusion."[4] "[U]ntrained examiners [are permitted] to draw inferences that the mental health community would itself find highly dubious."[5] Efforts are further hampered because "even with respect to problems most likely significantly to affect an individual's professional practice, forecasts in individual cases rarely will be conclusive."[6] Rhode also identified hypocrisy,[7] intrusiveness,[8] and unfairness[9] in the process, and suggested that this area has attracted "remarkably little scholarly interest" and "no systematic scrutiny" of underlying premises.[10] Despite its logical force, Rhode's critique has failed to change the realities of the bar admission process in this area.

In this Article, we attempt to advance a similar critique, but do so in a way that we hope will be more likely to lead to changes in the bar admission process. We share Rhode's assessment of mental and emotional fitness requirements, but because we understand the difficulty of convincing the bar examiners[11] to alter their approach, we advocate

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3. Rhode, *supra* note 1, at 584-85.

4. *Id.* at 581.

5. *Id.* at 582.

6. *Id.*

7. She considers it hypocritical to exclude individuals from practice on the grounds of contentiousness because the profession generally rewards such a trait. *Id.*

8. Rhode recognized that the requirement that applicants waive the confidentiality of their psychological treatment threatens the effectiveness of the counseling and is "flatly at odds with mandates of the American Psychiatric Association and the American Psychological Association . . . ." *Id.* at 582-83. This requirement forces applicants "to choose between developing adequate therapeutic relationships and minimizing certification difficulties [and] is not readily justified given the limited value of the information likely to be provided." *Id.* at 583.

9. She noted that "licensed attorneys . . . are not forced to make comparable tradeoffs, despite the temporally more relevant nature of any disclosures . . . ." *Id.*

10. *Id.* at 493.

11. We use the words "bar examiners" to refer to individuals who participate in fitness determinations concerning bar applicants. These individuals are not referred to as bar examiners in all jurisdictions, but for simplicity we use the words bar examiners here. We also recognize that the state supreme court may exercise ultimate authority over the bar admission process.

more modest changes. Rhode concluded that changing the bar examiners' focus from preliminary screening to post-admission sanction may solve the problems she identified.[12] Such a radical departure from present practice is likely to solve many of the problems that have been identified, but such an approach is not likely to be adopted soon, and we believe there is a need for immediate action. Although it is always possible that court decisions will compel the bar examiners to change their approach,[13] we question the wisdom of awaiting such a solution. Instead, we seek a negotiated solution. To this end, we advance a compromise. We believe that the examiners will not abandon the present system until they are given an acceptable alternative. To be acceptable to the examiners, a solution must permit them to make some inquiry concerning applicants' mental and emotional fitness, and to reject applicants on the basis of mental and emotional unfitness. The compromise we offer can both satisfy the examiners on these points and help many applicants avoid the difficulties that result from the current approach.

The compromise that we advance would benefit applicants in many jurisdictions, even though we formulated it while focused on problems in one jurisdiction, the State of Florida.[14] In fact, any comprehensive study of the problem would have to focus on one jurisdiction in order

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12. Rhode, *supra* note 1, at 589.

> In essence, the bar would cease monitoring character for purposes of admitting attorneys or of disciplining non-professional abuses. Such an approach would avoid the indeterminacies of standards, the rigidity of rules, and the pretense that either promises adequate public protection.

Id.

13. Legal arguments could be advanced in an attempt to implement the critique through court action. Those arguments are outside the scope of this Article. We assume that the legal status quo will continue, and ask how examiners can best be encouraged to change their approach, uncoerced by court decision. We do not discuss legal arguments that could be advanced to require the examiners to abandon their current approach because we believe that threats of court action are not part of an effective strategy for changing the bar examiners' approach in this area. For further discussion of constitutional considerations involved in bar admission, see Rhode, *supra* note 1, at 566-83; Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 655 (1981). Constitutional challenges to the process have proven unsuccessful in Florida, even though it is one of the few states with a freestanding state constitutional privacy provision. Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71 (Fla. 1983) (requirement that applicant disclose history of psychological and medical treatment and release all records was least intrusive means of achieving compelling state interest and did not violate state or federal privacy provisions, nor did it contravene applicant's due process rights or rights guaranteed by state constitutional section providing that no person shall be deprived of any right because of physical handicap).

14. Thus far, our efforts to encourage the bar examiners in Florida to change their approach and accept our compromise have not proven productive. *See infra* Section III (A).

to detail the various concerns involved. We focus on Florida here because it is the jurisdiction with which we are most familiar and because it provides a good example of the problem. In Florida, the examiners make particularly intrusive inquiries about all forms of psychiatric treatment, from counseling to hospitalization. This Article focuses on the effect that the examiners' inquiries have on counseling by a psychologist, rather than on other mental health treatment, because counseling is often available at no charge to law students through their university health centers, and because we believe that greater student use of those services would improve their mental and emotional fitness for the practice of law.

We begin with Professor Rhode's conclusions about mental and emotional fitness inquiries. How should those insights affect the bar admission process? The serious deficiencies she identifies in this area suggest a need to modify the current approach. However, it does not appear that Rhode's scathing indictment has had much of an effect. What will compel the bar examiners to take these problems more seriously? We try to reframe abstract critique in human terms and to give it a more complete factual context. We elaborate on the benefits and costs of the current approach and conclude that it is both costly and ineffective.

Next, we focus on the conflict that exists between the examiners' inquiry made by the examiners into applicants' treatment and the benefits of that treatment. We suggest that the conflict is inherent in the process, that it can be minimized, but not avoided, as long as the inquiry continues. Thus, the inquire and exclude approach represents one possible choice between two competing values: the benefits of inquiry and the benefits of mental health treatment. We argue that if there is any wisdom in the choice to inquire at the cost of discouraging treatment, it is penny-wise and pound-foolish because it discourages applicants from taking advantage of opportunities to develop their mental and emotional fitness before they are admitted to the bar. This is a mistake because law practice is stressful, and students need to prepare for the stress of practice, just as they need to prepare for its other demands. Through counseling, students can develop healthy coping strategies that will permit them to deal with the stress of practice. Without adequate preparation, they may resort to unhealthy coping strategies, such as drug or alcohol abuse. Given that the examiners' inquiry rarely results in exclusion, we conclude that the public is best protected if a balance is struck in favor of encouraging applicants to learn to cope with the stress of practice.

We propose that inquiries concerning treatment should be initiated in only those circumstances where more serious mental and emotional problems are involved. We will describe how the mental health delivery system, freed of the intrusive inquiries that now cripple its effectiveness,

can provide stronger support for law students who are subject to stress, and can help produce lawyers who are more fit for practice than the present system permits. We hope that this Article will contribute to a re-examination of the approach to mental and emotional fitness now used in most jurisdictions.

II. The Present Approach: Inquire and Exclude the Unfit

Nationally, bar examiners have taken a variety of approaches in determining applicants' mental and emotional fitness for admission to the bar. Some pay little attention to the mental and emotional fitness of applicants who have otherwise demonstrated their eligibility for admission. Others devote significant resources in an attempt to assure that only mentally and emotionally fit applicants are admitted to practice. Our focus is on the bar examiners in Florida, who devote significant attention, resources, and energy to this endeavor. Those examiners, like many others in the United States, use an "inquire and exclude" approach.

In Florida, the inquiry begins with the bar application.[15] If answers to questions on the bar application reveal that the applicant has undergone treatment, a written inquiry is made to the therapist concerning the treatment. The bar examiners may solicit additional information from various sources, and in some cases the matter is brought to informal or formal hearing.[16] The issue in this inquiry is whether or not the applicant should be excluded from admission to the bar.

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15. Question 29 of the Florida bar application asks:

a. ___ Yes ___ No Have you ever received diagnosis of emotional disturbance, nervous or mental disorder? If yes, please state the name, address, and zip of each psychologist, psychiatrist, or other medical practitioner who made such diagnosis.

b. ___ Yes ___ No Have you ever received REGULAR treatment for emotional disturbance, nervous or mental disorder? If yes, please state the name, address, and zip of each psychologist, psychiatrist, or other medical practitioner who treated you and the date you began treatment. (Regular treatment shall mean consultation with any such person more than four times within any 12-month period).

Application for Admission to the Florida Bar 10 (1989) [hereinafter Florida Bar Application]. Other questions in the application make related inquiries. Question 26 asks if the applicant has ever been addicted to or dependent upon the use of narcotics, drugs, or intoxicating liquors, or has been diagnosed as being addicted or dependent. Question 27 asks whether the applicant has, within the past ten years, undergone treatment for, counseling for, or consulted any doctor about the use of drugs, narcotics, or intoxicating liquors. Question 28 asks if the applicant has ever been declared legally incompetent. Question 29(c) asks if the applicant has ever been hospitalized or institutionalized or entered any other treatment facility for treatment of any condition or disorder listed in Question 29(a) and (b). *Id.* at 9-10.

16. In Florida, the Board of Bar Examiners consists of 12 lawyers and three non-

Since examiners inquire about the applicant's mental and emotional fitness for the purpose of excluding "unfit" applicants, the careful review of the limitations inherent in that approach is important. The limitations are best illustrated by comparing the Florida approach to some ideal approach.

If we were to design an ideal system for identifying and excluding unfit applicants, how would we proceed? First, we would define what we mean by "mentally and emotionally fit" applicants. We might describe such applicants as those who have the ability to meet the mental and emotional demands of practice, beyond intellectual and educational preparedness. Is it possible to go beyond that description and articulate mental and emotional characteristics which, individually or in combination, are necessary to meet the demands of legal practice? If so, how should applicants be examined to determine the applicants' presence or absence of those characteristics? It is likely that even if these characteristics could be defined, applicants would possess the identified characteristics in varying degrees.

Such an inquiry, if possible, would tell us much about the applicants, but it would only go part of the way toward determining fitness. We would still be left with the task of determining how much weakness in various characteristics would render the applicant mentally and emotionally unfit. Thus, to determine fitness, we should do more than inquire into the characteristics of applicants. We should devise a set of standards against which the findings made in the review of individual applicants could be measured. These standards should disqualify individuals from bar membership only if their mental conditions impair their ability to practice law. The fact that an applicant has an emotional condition

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lawyers who serve under the direction and control of the Supreme Court of Florida. McFarlain, *Character & Fitness Process Before the Florida Board of Bar Examiners*, 63 FLA. B.J., Jan. 1989, at 29. When the application and amendments do not satisfy the Board, an investigative or informal hearing process is conducted. *Id.* at 30. At the conclusion of that process, the applicant is told he or she has met the established character and fitness qualifications, or that further investigation is needed, or that specifications will be filed charging the applicant with matters which, if proven, would preclude the Board's favorable recommendation to the Supreme Court. *Id.* at 31. A formal hearing is then held on the specifications. One observer asserts that, of the approximately 2,000 applications for admission filed in a year, 120 will result in informal hearings. Green, *Passing the Bar May Not Be the Only Obstacle Between You and a Law Career*, RES IPSA LOQUITUR, UNIV. OF MIAMI SCHOOL OF LAW, Sept. 1988, at 13. Green estimates that about 10 individuals a year are denied admission on character and fitness grounds. *Id.* One other alternative exists. Rule 1-3.2(b) of the Rules Regulating the Florida Bar provides that an applicant with a prior history of drug, alcohol, or psychological problems can be admitted to active membership, subject to conditions of probation imposed by the Supreme Court of Florida. The conditions may include periodic psychological examinations or supervision by another member of the bar.

should not be disqualifying.[17] If the applicant has such a condition, does that condition constitute an impairment? The degree of impairment is sometimes difficult to assess.[18] Even if impairment can be determined, is it fair to exclude the applicant on that basis? Most would agree that individuals with a physical handicap should not be excluded from the practice on the basis of their impairment. Thus, a further inquiry may be appropriate. Does the impairment prevent the applicant from providing competent representation once admitted?

One further problem exists. Even if there were some way to determine the mental and emotional fitness of applicants at the time of application, there is no guaranty that applicants' fitness will remain constant. Even trained mental health practitioners have difficulty predicting future conduct, such as violent behavior or "dangerousness."[19] Therefore, this approach will always operate with a limitation: all predictions are based on present or past circumstances. The predictions made may or may not come true.

This leads us to conclude, as others have before us, that exclusion of mentally and emotionally unfit applicants is difficult business. It is difficult to isolate, with precision, "characteristics" of mental and emotional fitness, to test for them, to frame minimum standards, and to

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17. Indeed, some psychiatrists believe that certain emotional conditions make applicants better qualified to practice law; other conditions, like manic-depression, can be controlled through medication. Custer, *Georgia's Board to Determine Fitness of Bar Applicants,* 51 B. EXAMINER, Aug. 1982, at 17, 20.

18. For example, a psychiatrist informed a fitness board that the applicant "is acutely schizophrenic; however, I do not know how schizophrenic one must be before he should be disqualified from practicing law." *Id.* Such input led the board to conclude that it must "confront each case on an individual basis because it has become increasingly apparent that the mental health professionals cannot provide it with a litmus test." *Id.*

19. *See, e.g.,* J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981); Steadman, *The Right Not to Be False Positive: Problems in the Application of the Dangerousness Standard,* 52 PSYCHIATRIC Q. 84 (1980). This difficulty has been the subject of some debate. *See, e.g.,* Givelber, Bowers & Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action,* 1984 WIS. L. REV. 443, 463-64 (study of 2,875 psychiatrists, psychologists, and social workers finding that "therapists are quite confident in predicting future violence" and that "[s]even out of ten respondents believed that 90 - 100% of their colleagues would agree with their conclusion that the patient was dangerous"); McCarty, *Patient Threats Against Third Parties: The Psychotherapist's Duty of Reasonable Care,* 5 J. CONTEMP. HEALTH L. & POL'Y 119, 121 (1989) ("predicting dangerousness is something psychotherapists do quite often"). This difficulty has not discouraged courts from using such predictions. *See, e.g.,* Barefoot v. Estelle, 463 U.S. 880, 898 (1983) (rejecting "petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible"); Jurek v. Texas, 428 U.S. 262, 272 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" is a valid consideration in imposing the death penalty).

measure the findings against those standards. Even if this could be done with reasonable precision, the result would be only a prediction of the future, with uncertain accuracy.

A. The Benefits of the Present Approach

Although it is difficult to determine with precision whether applicants are mentally and emotionally fit for the practice of law, the present Florida approach seeks to avoid that difficulty by looking for suspicious behavior, rather than by attempting to articulate fitness standards or to measure each applicant against articulated standards.[20] Obtaining mental health treatment is one form of suspicious behavior to which bar examiners in Florida and elsewhere pay close attention. According to Rhode's study, ninety percent of all bar applications include questions regarding mental health.[21] Ninety-eight percent of the bar officials who responded indicated that the disclosure of psychiatric treatment would or might trigger an investigation.[22] Thus, applicants who seek any type of mental health treatment, including counseling, put their fitness at issue.[23]

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20. The CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS, which has been approved by the American Bar Association, the National Conference of Bar Examiners, and the Association of American Law Schools provides in relevant part that "character and fitness standards should be articulated and published by each bar examining authority." CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS, *reprinted in* A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1989 LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS 72 (published by the American Bar Association, Section of Legal Education and Admissions to the Bar) [hereinafter RECOMMENDED STANDARDS]. Locating applicable standards is a problem in Florida.

> There are published opinions and there are confidential unpublished opinions. The only persons with access to the unpublished confidential opinions are the members of the Court and the parties to the unpublished opinions. Since one of those parties is always the Board, it follows the examiners know the full body of the law and applicant's counsel does not.

McFarlain, *supra* note 16, at 33.

21. Rhode, *supra* note 1, at 581.

22. *Id.* at 534.

23. The RECOMMENDED STANDARDS includes a list of "Relevant Conduct" "the revelation or discovery of which should be treated as cause for further inquiry." RECOMMENDED STANDARDS, *supra* note 20, at 73. The list includes "evidence of mental or emotional instability." *Id.* But manifestations of mental illness are not the sole cause of concern. Resort to mental health treatment also raises questions about mental health. In Florida, the Florida Board of Bar Examiners adopted a protocol that provides that an applicant whose background contains any of a number of specified factors should be requested to submit to a psychiatric examination. Among the factors is a "[h]istory of repeated psychological or psychiatric or counseling sessions in which the true picture of the psychological diagnosis is uncertain to the Board." Pobjecky, *Everything You Wanted to Know About Bar Admissions and Psychiatric Problems But Were Too Paranoid to Ask,* 58 B. EXAMINER 14, 18-19 (1989).

This approach has some benefits. It allows the examiners to avoid the difficulties outlined above. This approach also makes the inquiry itself less difficult for the examiners. By seeking information about the applicant directly from the therapist, the examiners can conduct a comprehensive, but relatively inexpensive, investigation. The therapist probably is well informed. One commentator notes that "[s]uccessful treatment usually requires patients to disclose matters that are personal and embarrassing. The therapist has a unique relationship that allows access to the most intimate areas of the mind normally inaccessible to others."[24] Thus, assuming the therapist is cooperative and the applicant was candid during therapy, an inquiry to the therapist may reveal the best information available concerning the applicant's mental and emotional health.

Nevertheless, the focus on suspicious behavior places limitations on the effectiveness of the approach. The fact that applicants have not sought treatment is not proof that treatment is not needed. Indeed, the group needing the most attention may be those who have difficulties, but have not sought treatment. Unless these individuals have engaged in behavior that raises the examiners' suspicions, the inquire and exclude approach probably will not detect mentally and emotionally unfit applicants.

B. The Costs of the Present Approach

The inquire and exclude approach is costly on a number of levels. The time and resources of the bar examiners are the most obvious costs. The applicant also suffers economically if admission is delayed during the investigation, and if participation in formal or informal proceedings is required.[25] The applicant also suffers personally if questions of character delay admission and thus become public. There are also emotional costs because of the anxiety the investigation produces for the applicant.[26] These costs are easy to see and understand. However, there is a larger, but more subtle, cost attributable to the present system: lost opportunities to prepare lawyers for the stress of practice through the use of mental health resources available before admission to the bar.

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24. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*, 123 MIL. L. REV. 31, 40 (1989).

25. The economic costs could include legal fees, court reporter fees, travel costs, the retention of experts, and payment for the services of experts suggested or appointed by the examiners.

26. The prospect of discussing painful personal problems with strangers who have the power to deny bar admission, the prize for which the applicant has strived at great personal and financial cost for many years, will create anxiety no matter how diplomatically the actual appearance is handled by the examiners.

1. The Inquiry Conflicts With the Goal of Encouraging Fitness.— Those who employ the inquire and exclude approach may not intend to prevent bar applicants from taking full advantage of the mental health resources available to them as law students, but that is one of the consequences of that approach. It discourages applicants from seeking treatment, and interferes with treatment in cases in which treatment is sought. Thus, the approach carries a high cost and conflicts with the goal of encouraging fitness.

a. The inquiry discourages treatment

The examiners' inquiry into treatment has a chilling effect on applicants that discourages them from seeking treatment — applicants know that examiners inquire about treatment, and, thus, the inquiry discourages them from seeking or obtaining treatment. This effect is suggested, if not proven definitively, by a combination of logical analysis and common sense. The examiners' approach generally is known to potential applicants. Students learn of the examiners' inquiry from the bar application. Even if the application is ambiguous on this point, applicants will likely interpret it as requiring disclosure of treatment. Applicants are well advised to err on the side of disclosure when dealing with bar examiners. The available authorities suggest that bar examiners are more likely to deny an applicant admission for lack of candor than for any other reason, including mental disorder.[27]

If students do not find out about disclosure requirements from reading the bar application, they are likely to find out from others on campus who are familiar with the examiners' approach. Faculty, staff, and others who might recommend that students seek counseling are often familiar with the bar examiners' approach; they understand the dilemma that it poses for students who could benefit from the mental health resources the school makes available. Should faculty and staff recommend that potential bar applicants take advantage of those resources? Should they explain the bar examiners' approach before they make a referral? Such an explanation might discourage the student from seeking help. Should the individual making the referral attempt to gauge the extent of the student's need, and withhold full disclosure in more serious circumstances? The dilemma of hurting when you help, of creating future

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27. Custer, *supra* note 17, at 20 ("By far the greatest number of denials of applications have involved a lack of candor on the part of applicants in preparing their applications and in their appearances before the Board."); McChrystal, *supra* note 2, at 78 ("Misconduct in the bar admission process is one of the most cited bases for denial of admission on moral character grounds."); Rhode, *supra* note 1, at 535.

consequences for students by referring them to counseling services, is a recognized consequence of the present approach.[28]

Assuming that potential applicants could remain completely unaware of the examiners' approach before seeking counseling, it is reasonable to assume that they will be notified of the examiners' approach at the time they seek treatment. Psychologists who treat law students are likely aware that the examiners inquire about treatment because of inquiries made to them concerning former patients, if not from other sources. If psychologists are aware of the disclosure requirement, they are obligated to disclose its existence to applicants seeking treatment.[29] For example, in the case of the "four visit rule"[30] in effect in Florida, if the therapist is aware of the rule, he or she should advise a law student planning to apply for licensure in Florida of the consequences of more than four visits prior to the fourth visit. Thus, a potential applicant is likely to find out about the examiners' approach and be subject to its chilling effect.

The knowledge that applicants must report their treatment to the examiners will discourage them from seeking treatment.[31] Although it has not been studied empirically, it seems logical that disclosure will have a chilling effect.[32] The risk of discouraging treatment is further compounded when the examiners seek to obtain confidential information compiled by the therapist in connection with the treatment.[33]

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28. Kaslow, *Moral, Emotional and Physical Fitness for the Bar: Pondering (Seeming) Imponderables,* 51 B. EXAMINER 38 (1982).

29. *Report of the Association: Ethical Principles of Psychologists* (amended June 2, 1989), 45 AM. PSYCHOLOGIST 390, 392-93 (1990) [hereinafter *Ethical Principles*]. Principle 5 of the Ethical Principles of Psychologists provides that "where appropriate, psychologists inform their clients of the legal limits of confidentiality." *Id.* Principle 6 states:

> Psychologists fully inform consumers as to the purpose and nature of an evaluative, treatment, educational or training procedure and they freely acknowledge that clients, students, or participants in research have freedom of choice with regard to participation.

Id. If a psychologist knows that a law student will be required to waive confidentiality of treatment during the bar application process, the psychologist is ethically compelled to disclose that fact to the client.

30. Question 29 of the Florida Bar Application defines regular treatment, which must be disclosed, as more than four visits in a 12-month period.

31. As in aversive conditioning, which pairs the behavior to be avoided with negative consequences, the examiners have paired counseling with all the negative consequences that flow from putting one's mental and emotional fitness at issue. For this reason, we expect applicants to respond by avoiding counseling, even if counseling would benefit them.

32. "Stigma is attached to therapy, in part because graduates may be asked in the bar application if they have ever sought therapy; their answer may be a deterrent to employment." Gutierrez, *Counseling Law Students*, 64 J. COUNSELING & DEV. 130, 132 (1985).

33. Interference with treatment is the subject of the next Section.

Empirical data is lacking because the chilling effect is the logical result of the inquiry, and empirical support is unnecessary to establish the existence of the effect. Another reason for the lack of empirical data is the difficulty involved in designing a study of the problem.[34] In designing a study, the applicants must be asked directly whether the examiners' inquiries concerning counseling have discouraged or would discourage their use of such services. However, if applicants are asked directly whether the disclosure requirement, or the follow-up by the examiners to determine whether they are nevertheless fit, would discourage them from using such services, the questions themselves suggest that the interviewer thinks a reason exists for the applicant to be concerned. The danger is that the suggestion implicit in the question might give applicants the impression that even if they are not concerned about the disclosure requirement, they should be. Thus, a study of the chilling effect would likely increase the effect.

A series of other problems might be encountered if such a study were attempted. Which applicants should be the focus of the study? Should the study focus on all applicants, or only those who have actually faced the problem? Only those who respond based upon actual experience have balanced the interests, made the decision, and lived with the consequences. For them, the inquiry is not hypothetical. It asks: What did you do? Anyone else answering the survey would be responding based upon how they think they would respond if faced with that dilemma. How helpful can those responses be? If those responding have not actually felt that conflict, or faced the consequences, their responses, though probably well intended, might be no better than the commentary that already exists.

In summary, the inquiry into the existence of treatment itself discourages treatment. Because the examiners' inquiry deters psychological or psychiatric treatment, the current approach penalizes those who recognize a need for assistance and is unlikely to yield greater mental health among the practicing bar.[35] Understandably, many applicants are unwilling to engage in any activity, no matter how beneficial it might later prove to be, if their mental and emotional fitness for practice is put at issue when they seek admission to the bar.

Examiners argue that applicants who forego counseling are overreacting because it is, after all, quite unlikely that they will be denied admission on the basis that they obtained mental health treatment. This response is unsatisfying for two reasons. First, the more progressive

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34. We do not suggest that such a study would be impossible. Rather, we identify difficulties in undertaking such a project.

35. Rhode, *supra* note 1, at 582.

attitude about counseling that this assumes is often not apparent from the way the inquiry is made on the bar application. Second, even if the examiners have a progressive attitude, attitude alone cannot solve the problems presented by the examiners' inquiry. Many bar applications display a less than progressive attitude toward mental health treatment. Most applicants, counselors, and those who might recommend counseling will know little about how the examiners actually view the decision to seek counseling. The individual recommending counseling may see a significant difference between counseling and hospitalization. The bar application may be unclear on whether the examiners take a similar view. The secrecy that normally surrounds the examiners and the bar admission process makes it difficult to clarify such a point. Even if the examiners publicly proclaim that they do not believe counseling is a bad thing, or if they amend the bar application to reflect that, the problem may persist.[36] As long as the existence of counseling puts the applicant's mental and emotional fitness at issue, the applicant will be discouraged from seeking treatment. The assertion that the inquiry creates a chilling effect is strengthened further because the applicant knows, or will be told by the therapist, about the follow-up inquiry that can be expected when the examiners discover the applicant has received treatment.

b. The inquiry interferes with treatment

Although each state's follow-up varies, Rhode's data generally suggests that examiners believe psychiatric treatment should be investigated once it is disclosed.[37] Therefore, although the examiners' approach varies by jurisdiction, some follow-up is likely. For example, in Florida, once "regular treatment" with a "psychologist, psychiatrist or other medical practitioner" is disclosed, the examiners send a follow-up letter to the treating practitioner, requesting detailed information concerning the applicant, the treatment, and the prognosis. Such highly intrusive inquiries have significant consequences for treatment.

During treatment, either the applicant, the therapist, or both might be affected by the knowledge that the records of the treatment will not

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36. For example, the preface to the Florida Bar Application now provides:

> Questions regarding psychiatric treatment are not intended to invade unnecessarily the privacy of an applicant or to probe into desirable treatment or counseling for most nervous or depression related disorders.

This message is encouraging, but nevertheless somewhat inconsistent with the examiners' actual practice. As discussed later, the examiners conduct an overly intrusive inquiry into the applicant's treatment. Rhetoric alone cannot resolve the conflict inherent in the present inquire and exclude system.

37. Ninety-eight percent of the bar examiners responding to Rhode's study indicated that psychiatric treatment generally would or might trigger an investigation. Rhode, *supra* note 1, at 534.

remain confidential. The counselor has a duty to inform the law student seeking counseling about bar application disclosure requirements. Therefore, both parties are aware from the outset that the therapeutic interaction is not confidential from the bar. The first consequence may be that the patient will not be candid. "For therapy to be effective, the therapist must be able to persuade the patient to talk freely and fully and that it is safe to do so."[38] The bar's inquiry destroys the development of the trust and openness on which successful therapy depends. The informed student is unlikely to disclose necessary information if disclosure could threaten his or her admission to the bar. The second consequence may be that the therapist alters the treatment. The therapist, whether consciously or not, is likely to avoid or not take note of those areas that may prove problematic or open to misinterpretation, or where disclosure may not be in the patient's best interests. Thus, the examiners' intrusion affects both patient cooperation and treatment strategy.

Psychologists, like attorneys, have a primary obligation to protect the confidentiality of any information obtained under the psychotherapist/patient relationship,[39] except where there is a clear and present danger.[40] As with attorney/client privilege, this principle serves the important purpose of promoting full and honest disclosure. Without the benefit of confidentiality, the nature of therapy changes. When the patient is or will be an applicant to a bar that makes an inquiry into treatment, treatment becomes similar to an evaluation ordered by a third party.[41] In such situations, the patient should be advised of the future disclosure if it is not already known. Knowledge of that disclosure will

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38. Kaslow, *supra* note 28, at 42.

39. Psychologists have professional ethical rules that govern disclosure of confidences. *See supra* note 29 and *infra* notes 41-49 and accompanying text. Commentators have noted that it is incongruous for lawyers, who are ethically bound to respect client confidences, to require psychologists to violate such confidences during the bar admission process. Elliston, *supra* note 2, at 13.

40. An exception to the confidentiality rule exists when psychotherapists have a duty to warn and/or protect potential victims from a patient's violent acts. *See, e.g.,* Schuster v. Altenberg, 144 Wis. 2d 223, 424 N.W.2d 159 (1988).

41. Principle 6b provides that "[w]hen a psychologist agrees to provide services to a patient at the request of a third party, the psychologist assumes the responsibility of clarifying the nature of the relationship to all parties concerned." *Ethical Principles, supra* note 29, at 393. The fact that the applicant's therapist is actually a consultant to the bar examiners is underscored by the procedure followed when the therapist fails to clarify "the true picture of psychological diagnosis" to the examiners. Pobjecky, *supra* note 23, at 19. In that event, the examiners retain a psychiatrist to conduct a psychiatric evaluation of the applicant. *Id.* The psychiatrist answers questions quite similar to those posed in the examiners' letter to the applicant's therapist. *Compare* letter to applicant's therapist *infra* text accompanying note 42, *with* psychiatric evaluation report requirements, *infra* note 54.

clearly affect the patient's attitude about the evaluation, presentation, and degree of candor. In this way, the examiners' inquiry changes the nature of the therapeutic relationship, and significantly limits its utility.

The examiners' inquiry not only interferes with treatment as described, but the follow-up letter also places the therapist, who is asked to respond to the examiners' inquiry, in an untenable position. The therapist must choose between disclosure, which may not be in the patient's best interests, and nondisclosure, which would also not be in the patient's best interests because it would delay or defeat the patient's application to the bar. The form letter that the Florida examiners send to psychiatrists and psychologists is a large part of the psychologists' concern. The form letter used in Florida will be reviewed and critiqued here in detail because it demonstrates the type of difficulties that a thorough follow-up can create. It asks the psychologist or psychiatrist to inform the examiners of his or her "analysis of [the] applicant's condition, along with a description of the treatment afforded and your prognosis in the case." It requests "cooperation in commenting on the following areas":

> 1. State why the applicant underwent therapy with you, the goals of such therapy and whether that goal has been achieved.
> 2. Advise whether there is or was evidence of psychosis.
> 3. Document a mental status examination.
> 4. Provide the results of any psychological testing undertaken by you or at your direction or your statement that testing was not warranted by the facts as you saw them.
> 5. List all medication that was prescribed for the applicant including a description of the medication and the results, if any, that might occur with the discontinuation of the medication either at doctors direction or by the applicant's decision.
> 6. Do you feel that the applicant needs further treatment, monitoring or supervision prior to or during the independent practice of law?
> 7. Your opinion on whether the applicant's current condition would inhibit the applicant's future independent unsupervised practice of law. Among other things, "the unsupervised practice of law" includes the ability to be truthful even if to do so may be to the applicant's embarrassment, financial disadvantages (sic) or other detriment; the ability to represent clients in a timely manner by keeping appointments and meeting deadlines; and to handle money for others.[42]

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42. Form letter from the Florida Board of Bar Examiners (applicant reference omitted) (on file at Indiana Law Review).

The Ethics Committee of the American Psychological Association has ruled[43] that "the Florida Board of Bar Examiners' method of requesting the specifics of treatment of law student clients is asking the psychologist to violate the *Ethical Principles of Psychologists*. . . ." The Association particularly noted violations of Principles 1,[44] 6,[45] 8,[46] 8.c,[47] and 8.d.[48]

Ethical considerations are particularly troublesome in the area of testing. Paragraph 4 of the letter requires disclosure of test data. Psy-

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43. Letter from David H. Mills, Ph.D. to Malcolm Kahn, Ph.D. (July 6, 1987) (included the ethics opinion) (on file at Indiana Law Review). The opinion was based on an earlier version of the follow-up letter that did not include paragraphs 3 and 5 of the present letter of inquiry.

44. Principle 1 states:

> In providing services, psychologists maintain the highest standards of their profession. They accept responsibility for the consequences of their acts and make every effort to ensure that their services are used appropriately.

Ethical Principles, *supra* note 29, at 390.

45. Principle 6 states:

> Psychologists respect the integrity and protect the welfare of the people and groups with whom they work. When conflicts of interest arise between clients and psychologists' employing institutions, psychologists clarify the nature and direction of their loyalties and responsibilities and keep all parties informed of their commitments. Psychologists fully inform consumers as to the purpose and nature of an evaluative treatment, educational or training procedure, and they freely acknowledge that clients, students, or participants in research have freedom of choice with regard to participation.

Id. at 393.

46. Principle 8 states:

> In the development, publication and utilization of psychological assessment techniques, psychologists make every effort to promote the welfare and best interests of the client. They guard against the misuse of assessment results. They respect the client's right to know the results, the interpretations made, and the bases for their conclusions and recommendations. Psychologists make every effort to maintain the security of tests and other assessment techniques within limits of legal mandates. They strive to ensure the appropriate use of assessment techniques by others.

Id. at 394.

47. Principle 8.c states:

> In reporting assessment results, psychologists indicate any reservations that may exist regarding validity or reliability because of the circumstances of the assessment or the inappropriateness of the norms for the person tested. Psychologists strive to ensure that the results of assessments and their interpretations are not misused by others.

Id.

48. Principle 8.d states:

> Psychologists recognize that assessment results may become obsolete. They make every effort to avoid and prevent the misuse of obsolete measures.

Id.

chologists are ethically compelled to maintain the security of test results and to guard against their misuse.[49] The release of test results to persons untrained to interpret them, especially with the knowledge that such results may be used against a client, is unethical.[50] To be useful, test data must always be interpreted carefully and within the context of the clients' background, current experiences, and presenting complaints.[51] Without such context and experience in interpretation, test results are misinterpreted easily and may be under- or over-pathologizing. Thus, the demand for psychological test results is a disincentive for psychologists to use tests with law students even if their use may be helpful for treatment. Furthermore, students' knowledge that such test results may be provided to the bar makes it impossible to obtain the open, honest, natural response to test materials that is necessary for an accurate evaluation.

Other aspects of the letter's inquiry are also problematic. Paragraph 2 of the letter requests "evidence of psychosis." If the client is not diagnosed as psychotic, why is this information necessary? Will the examiners independently review the evidence and come to their own conclusion? If so, is it ethical for the psychologist to provide such information? Paragraph 3 requests that the psychologist document a mental status exam. Mental status is a fluid concept. The results of the exam may differ as treatment progresses. No current exam may be available. Should old information be forwarded? How will such information be used? Paragraphs 6 and 7 seem to be an attempt to shift some of the responsibility for making difficult judgments to the psychologist. What does it mean to say that a person needs further treatment? That they cannot function at all without it? That they cannot function effectively without it? That they would benefit from it? Question 7, regarding whether a current condition may inhibit the applicant's future independent unsupervised practice of law, raises liability concerns, especially for counseling centers maintained by private universities. If a psychologist recommends a student to the examiners in answer to this question, and that student then becomes a lawyer and steals money from a client, will the client argue that the psychologist, and the university that employs the psychologist, should be legally responsible for the loss?

How do the examiners use this information? Certainly it is evidence of a thorough investigation. But how is the confidential information

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49. Principle 8, Assessment Techniques. *Id.*

50. "[T]est-derived data in the hands of an untrained professional . . . is a tool of potential harm." Matarazzo, *Computerized Clinical Psychological Test Interpretations*, 41 Am. Psychologist 14, 19 (1986).

51. A. Anastasi, Psychological Testing (4th Ed. 1976); Matarazzo, *supra* note 50, at 19.

that is obtained actually used to evaluate fitness? How can bar examiners competently evaluate the information they receive in connection with their inquiries to psychiatrists and psychologists?[52] In Florida, the examiners may review the information themselves, or they may order a psychiatric evaluation by "a board-certified psychiatrist in active clinical practice and preferably with a sub-speciality interest in the type of disorder being evaluated."[53] The psychiatrist is asked to provide the bar examiners with a written report addressing six specific points.[54] Nevertheless, it appears that the examiners, at some point in the process, act as amateur psychiatrists.[55]

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52. Kaslow, *supra* note 28, at 41. Kaslow suggests that "[i]f mental health professionals, trained in personality assessment, cannot always agree on a person's diagnosis, how is one attorney to make a determination of another's emotional fitness?" *Id.*

53. Pobjecky, *supra* note 23, at 18-19.

54. Those six points are:

* Documented mental status examination.
* Evidence of psychosis, if any.
* Results of psychological testing or statement that testing was not necessary in the evaluation of the applicant.
* Applicant's medications, including description of effects, side effects and what may occur if the medication is discontinued at doctor's direction or on applicant's decision.
* Opinion of whether psychiatric problems that the applicant exhibits now or has exhibited in the past will inhibit applicant's future independent practice of law.
* Specific recommendations on whether drug level testing, therapy, monitoring, or other treatment would be necessary prior to or during the independent practice of law.

Id. at 19. One problem with this request is that psychiatrists are not necessarily qualified to administer or interpret psychological tests. That is the domain of the psychologist. Some other problems with individual points, such as the concerns raised by the request for evidence of psychosis, have already been addressed. *See supra* note 51 and accompanying text.

55. In a recent article, the general counsel of the Florida Board of Bar Examiners stated:

> Throughout the identification and determination steps, an invaluable reference is the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, third edition (commonly known as DSM-III). Published by the American Psychiatric Association, the manual classifies the different mental disorders. DSM-III provides the user with brief, insightful information as to each disorder on several topics including: diagnostic criteria, essential and associated features, complications, impairment, age at onset, and sex ratio. Based on personal experience, one need not have background in psychology to benefit from the use of this manual.

Pobjecky, *supra* note 23, at 19. The fact that the General Counsel to the bar examiners would make a statement recommending use of the DSM-III "[b]ased on personal experience" further evidences the unlicensed practice of psychiatry by bar examiners. An additional concern is that the reference work recommended in the article was out of date at the time it was recommended. DSM-III was replaced by DSM-III-R in 1987. The article recommending the use of DSM-III appeared in 1989.

2. The Consequences of Discouraging and Interfering With Treatment.—The next question is: What are the consequences of discouraging treatment? Before we can understand and weigh the gravity of the current approach's consequences, we must understand generally about stress and treatment in relation to the law student and the lawyer. This Section first discusses the stress with which applicants must cope, and describes how treatment can help the applicant learn to cope with that stress. Second, it attempts to put treatment in a larger perspective.

a. Applicants' stress

Stress is defined physiologically as "any stimulus . . . that disturbs or interferes with the normal physiological equilibrium of an organism."[56] The human body automatically responds to any stressful situation. There is an elevation of certain hormones; an increase in heart rate, blood pressure, breathing, and perspiration; an increase in muscle tension; a slowing of digestion; and a feeling of heightened mental awareness.[57]

In the short run, this automatic reaction is extremely adaptive. The mental alertness and heightened concentration can lead to improved performance in situations such as running a race, giving a presentation, or responding to an emergency. If stress is not diminished, however, its effects can be deadly. As we exhaust our adaptive energy reserves, we become more susceptible to diseases. Doctors estimate that up to 75% of all visits to physicians are prompted by stress-related problems.[58] Stress has been implicated in hypertension, coronary heart disease, migraine and tension headaches, insomnia, ulcers, asthma, and skin disorders. Stress is often the culprit in harmful habits such as smoking, overeating, and drug and alcohol abuse.[59]

The symptoms of stress exhaustion, or exposure to prolonged stress, cross areas of human functioning beyond the physical. Emotionally, symptoms include anxiety, frustration, depression, irritability, apathy, and anger. Cognitive difficulties such as increased distractibility, forgetfulness, poor concentration, boredom, loss of motivation, and low productivity often result. There may be spiritual symptoms including feelings of emptiness and loss of direction and meaning in one's life. Finally, there are relational symptoms such as withdrawal, loneliness,

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56. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1300 (college ed. 1968).

57. E. CHARLESWORTH & R. NATHAN, STRESS MANAGEMENT 4 (1984) [hereinafter CHARLESWORTH].

58. CHARLESWORTH, *supra* note 57, at 8.

59. T. MILLION, C. GREEN & R. MEAGHER, HANDBOOK OF CLINICAL HEALTH PSYCHOLOGY 103, 110 (1982).

distrust, intolerance, lowered sexual drive, and resentment of others.[60]

One significant effect of stress is that persons can become trapped in vicious cycles. Consider an individual with an important project and a rapidly approaching deadline. Already under stress, this person may be distracted and miss easy solutions to pressing problems. Under time pressure, the individual is not likely to eat well, leading to a decrease in already depleted energy reserves. Feelings of frustration and pressure at work may lead to irritability at home, resulting in alienation from family and friends. The result is increased stress.

The general stress cycle may be described as follows: Exposure to stressors leads to the physiological, behavioral, emotional, and cognitive symptoms discussed previously that eventually lead to behavioral disorders (obesity, alcoholism); medical disorders (headaches, heart disease); emotional disorders (chronic anxiety, depression); memory problems; obsessive thoughts; and sleep disorders.[61] The result is decreased productivity, enjoyment of life, and capacity for intimacy.

Such negative consequences are not inevitable for stress prone individuals if they can be taught more adaptive responses. Techniques such as assertiveness, time management, relaxation, exercise, good nutrition, and alternative ways of thinking can lead to increased self-esteem, improved physical health, resistance to disease, improved mental health, and resistance to future stressors. The effect is increased productivity and an improved quality of life. Such strategies are the most effective before the onset of significant stress. For lawyers, the ideal time for learning adaptive coping mechanisms is in law school before the novice lawyer is overwhelmed by practice and stuck with the maladaptive patterns that lawyers often develop to cope with the stress in their lives.

Although what is stressful for one person may not be stressful for another, pressure from the environment is almost always stressful. The lawyer's environment is rife with external pressure and stress. The legal profession involves a great deal of responsibility. The law involves significant uncertainty and is subject to change. Lawyers must operate as counselors and advisors in this legal environment, suggesting courses of action to clients who are often demanding, angry, or upset. If the client is not pleased with the outcome of a transaction, the lawyer is a likely target of the client's dissatisfaction. And yet, the lawyer must remain calm, courteous, and professional; lawyers need clients and must abide them.

Beyond the clients, there is the variable nature of the work. Hours are irregular and generally long, making it difficult to meet obligations

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60. CHARLESWORTH, *supra* note 57, at 22.
61. *Id.*

outside of work or establish a regular lifestyle beyond the office. For litigators, there is the additional pressure of trial work. Personal life may be put on hold at unpredictable times. The performance of trial lawyers is determined by the facts of the case, but it is also subject to many forces beyond the lawyers' control. The unknown or the unforeseen constantly threatens.

Beyond the work itself is the stress of office politics and competition. In many cases, there is a question of partnership, and the constant evaluations by both peers and superiors. Not everyone will make it, and those who do make it seem to be the ones who work the longest hours and make the most sacrifices. Once partnership is achieved, further goals are established. Success one year may establish expectations that may be used as a standard for future performance.

The above description is clearly reminiscent of the Type A or coronary-prone behavior pattern. Type A individuals are highly competitive, hard-working, impatient, time-conscious, driven to achieve, visibly tense, and have a tendency to suppress hostility. They frequently strive to do two or more things at once and feel guilty and preoccupied when trying to relax.[62] It is not surprising then that occupational stress and emotional strain have been found to be major etiological factors in coronary heart disease among lawyers.[63]

Further, the competitive, aggressive nature of practice makes it unwise for lawyers to admit to weakness or to express fears, doubts, concerns, or frustrations. If lawyers do not articulate their concerns, they are unlikely to receive much emotional support or to take other steps necessary to mediate the effects of their stress. Since lawyers are trained to present themselves as strong, effective, and competent, others are probably unlikely to view them as in need of support or sympathy.

Three approaches are available to control stress: avoiding the stress, modifying the stress, or modifying the patient's adjustment to stress.[64] Lawyers must continue to work in stressful environments, so they require a solution for stress that does not involve avoidance or modification of stressful situations. They must learn to adjust to stress. Relaxation and exercise have the potential to provide relief.

> Whether the relaxation response is obtained through transcendental meditation, prayer, hypnosis, biofeedback, exercise, music

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62. M. Freidman & R. Rosinman, Type A Behavior and Your Heart 70-79 (1974).

63. Russek & Russek, *Is Emotional Stress An Etiological Factor in Coronary Heart Disease?*, 17 Psychosomatics 63, 66 (1976). "The candidates for coronary heart disease appear to be those individuals whose homeostatic mechanisms remain chronically mobilized in response to the challenges of a rapidly changing environment. Such persons demonstrate a failure to master stress in continuum." *Id.*

64. *Id.*

> or the like, regular practice should be encouraged for both primary and secondary prevention as well as for the symptomatic treatment of angina pectoris itself. Exercise would appear to be another valuable technique for neutralizing the cumulative effects of stress.[65]

Lawyers have difficulty developing healthy strategies for coping with stress on their own. The long and often unpredictable hours, coupled with the continuing competition in legal practice, make it difficult for lawyers to develop a lifestyle conducive to stress management. Inexperienced lawyers, who tend to work longer hours, are less likely to have important recreational interests and are less likely, even than physicians, to take vacations, two healthy stress management strategies. Only twenty-nine percent of lawyers reported participating in strenuous sports such as jogging and skiing.[66]

The strategies that lawyers develop on their own may involve drug or alcohol use and may cause harm to themselves and their clients. Drugs and alcohol may be used to escape from stressors. Such strategies are ineffective because they create additional problems. Lawyers commonly employ other unhealthy strategies for avoiding stress in their practice. For example, a lawyer may fail to return clients' phone calls if the lawyer believes the calls will increase his or her level of stress. Even if this one stress avoidance technique were abandoned, lawyer/client relationships would improve dramatically. The most common client complaint is that lawyers do not return phone calls.[67] If lawyers provided their clients with routine, three-minute status updates, clients would call less.[68] If lawyers would learn healthier coping strategies for dealing with stress, the practice itself might prove less stressful. The proliferation of seminars on managing stress at bar conventions and in continuing legal education programs demonstrates an increasing awareness of the need to address the problem of stress.

Stress does not begin in practice. Law school is also stressful. Law students experience unusually high levels of stress, anxiety, and depression because of the nature of legal training.[69] Although many people recognize

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65. *Id.*

66. Krakowski, *Stress and the Practice of Medicine: Physicians Compared With Lawyers*, 42 PSYCHOTHERAPY AND PSYCHOSOMATICS 143, 147 (1984).

67. Cory, *Helping the Client Deal with Stress*, 9 B. LEADER 17, 31 (1984); DeBenedictis, *Lawyers Told to Address Clients' Stress*, 97 L.A. Daily Journal, March 21, 1984, at 5, col. 1.

68. DeBenedictis, *supra* note 67.

69. Guiterrez, *supra* note 32. Guiterrez collects much of the psychological literature on law student stress and distress and notes that "[p]rofessional counseling journals have focused little attention on the problem." *Id.*

that law school is stressful,[70] some commentators recommend changes in the way lawyers are trained,[71] but others do not.[72]

Law school is not only stressful, it may actually promote unfitness. Empirical studies have shown that when compared to medical and other graduate students, law students experience greater stress.[73] Symptoms of that stress include increased depression, anger, hostility, anxiety, social alienation, and obsessive-compulsive behavior.[74] Such symptoms increase during law school so that third-year students and graduates tend to be more symptomatic than first year students.[75]

Law students do not know how to handle the stress of law school effectively. One study[76] asked students in various graduate programs, "Have you had any crises which clearly put you behind in your studies?" For medical students, psychology students, and law students the most frequently reported crises involved relationships. When the students were asked how they handled the crisis, medical students most frequently reported that they sought help or support from family or friends; psychology students reported seeking help from professional therapists; and law students reported that they handled the crisis themselves. Another

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70. *See, e.g.,* Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV.L. & SOCIAL ACTION 71 (1970); Richardson, *Does Anyone Care for More Hemlock?*, 25 J. LEGAL EDUC. 427 (1973); Stone, *Legal Education on the Couch,* 85 HARV. L. REV. 392 (1971); Taylor, *Law School Stress and the "Deformation Professionelle,"* 27 J. LEGAL EDUC. 25 (1975); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education,* 37 U. CIN. L. REV. 93 (1968).

71. *See, e.g.,* Stone, *supra* note 70, at 417 ("Changes in teaching techniques must be designed to counterbalance the psychological impact of the Socratic method while retaining its academic advantages.").

72. *See, e.g.,* Taylor, *supra* note 70, at 267 ("[N]othing in the evidence here reviewed proves the necessity of specific changes.").

73. Heins, Fahey & Leiden, *Perceived Stress in Medical, Law and Graduate Students,* 59 J. MED. EDUC. 169 (1984) [hereinafter Heins I] (finding that law students had higher overall levels of stress associated with academic, economic, and time concerns, and fears of failure, and work related issues than medical students or graduate students in psychology or chemistry); Heins, Fahey & Henderson, *Law Students and Medical Students: A Comparison of Perceived Stress,* 33 J. LEGAL EDUC. 511 (1983) [hereinafter Heins II] (finding that law students indicated significantly more psychological stress associated with academics and fear of failure than medical students); Kellner, Wiggins & Pathak, *Distress in Medical and Law Students,* 27 COMPREHENSIVE PSYCHIATRY 220 (1986) [hereinafter Kellner] (finding that law students reported more depression, anger, and hostility and less contentment and friendliness than medical students).

74. Benjamin, Kaszniak, Sales & Shanfield, *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers,* 1986 AM. B. FOUND. RES. J. 225, 236 (1986) [hereinafter Benjamin]; Kellner, *supra* note 73, at 221.

75. Benjamin, *supra* note 74, at 241; Kellner, *supra* note 73, at 220.

76. Heins I, *supra* note 73, at 175-76.

study found that forty-three percent of law students reported excessive drinking.[77]

Few studies actually document the diagnoses or presenting problems of law students. However, existing data suggest that law students are not seriously dysfunctional. In one study involving law students conducted over a period of four years, twenty-four percent were diagnosed with mild anxiety disorders, and two percent with other or no diagnoses. Six percent had major depressions, and nineteen percent had personality disorders, although only ten percent of those were more serious variants. Forty-three percent of these students saw school or career issues as their primary stressor. Twenty-nine percent of the students had relationship concerns, seven percent had family concerns, and four percent had health concerns.[78]

In unpublished data from the University of Miami Counseling Center gathered over two and one-half years, thirty-one percent of law students presented with conflict in or breakup of their primary relationship, twenty-three percent presented with occupational or academic concerns, thirteen percent presented with generalized depression, five percent presented with social/dating problems, five percent presented with generalized anxiety/tension, five percent presented with family conflicts, four percent presented with physical problems, and three percent presented with eating disorders. One percent presented with drug/alcohol problems, and one student was suicidal.[79]

The counseling center is an available resource. Almost all universities provide free counseling services to students through counseling centers on campus.[80] The counseling center is a particularly important resource because the law school curriculum fails to prepare law students for the stress of practice in any systematic way.[81] Thus, the approach currently used by the examiners to identify and exclude unfit applicants actually discourages applicants from taking advantage of the only significant

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77. Heins II, *supra* note 73, at 522.

78. Dickerson, *Psychological Counseling For Law Students: One Law School's Experience*, 37 J. LEGAL EDUC. 82, 84 (1987) (percentages calculated from raw data).

79. Blum, Unpublished Study (1988) (on file at Indiana Law Review).

80. A survey of ABA accredited law schools found that the majority provide a mental health or counseling center for students, but less than one-fifth designate a mental health professional specifically for law students. Dickerson, *supra* note 76, at 83. An unpublished 1986 Counseling Center Survey noted that only two percent of the 213 centers surveyed charged students for counseling. Directors' Annual Data Bank Survey of College and University Counseling Centers (1986) (on file at Indiana Law Review).

81. Stress management is taught occasionally, but it is not currently a focus of the standard law school curriculum. Specific suggestions for additions to the present curriculum are the subject of a later section.

resource that most universities have to teach students how to cope with stress.

b. How treatment can help

Counseling or psychotherapy of any sort may be broadly viewed as a set of procedures through which one learns to enhance the quality of one's life in the context of a helping relationship. Though broad, this definition applies whether one seeks help in response to major mental illness (schizophrenia or major depression) or to simple life stressors (financial concerns, conflict with relationships, or job pressure). On one end of the continuum of mental health, clients may be helped so that they can meet minimal requirements for daily living; at the other end, therapy is more concerned with developing competence and feelings of self-sufficiency, allowing clients to make the most of their lives.

A myriad of techniques are available, and almost as many theories concerning which techniques are most useful for a particular difficulty. Goals in therapy are generally client specific. They depend on the nature of the presenting complaint and the client's capacity for growth. After successful psychotherapy, clients should experience much more than just the relief of symptoms. They should also display an increased capacity to cope with stressful or difficult events and, having the capacity to cope successfully, they should feel better about themselves and more optimistic about the future. As such, good psychotherapy may be said to have a preventative element. Minimally, the client's repertoire of coping strategies is expanded; maximally, the client's instrumental style of coping becomes more flexible, adapting to the demands of various circumstances.

c. Treatment in perspective

Law students should be as free to seek assistance from a psychologist as they are to seek church counseling or the advice of their family or friends. The present approach in Florida treats those situations differently. Although counseling by a psychiatrist or psychologist triggers an inquiry, counseling by an unqualified layman, or by qualified individuals who are not psychiatrists and psychologists, does not even need to be reported. Why, for example, should students who come from religious or cultural backgrounds that encourage counseling by a member of the clergy be treated differently than those who use the university counseling center?

Therapy, like other traditions, attempts to encourage personal growth through guided introspection.[82] Increased self-awareness is essential to

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82. "The pilgrim, whether patient or earlier wayfarer, is at war with himself, in struggle with his own nature. All of the truly important battles are waged within the self." S. KOOP, IF YOU MEET THE BUDDA ON THE ROAD, KILL HIM 8 (1972).

professional competence.[83] The applicant's attempt to accomplish such personal goals through therapy, rather than through some older tradition, should not be viewed as raising a question concerning the applicant's fitness to practice law. Actually, counseling should be encouraged because the results will help the applicant and benefit the public. A broader view of therapy as yet another tradition promoting personal growth suggests that it is the applicants who do not seek therapy, or who do not otherwise take affirmative steps to grow into their new responsibilities, that are likely to encounter problems later.

The public is not well served by a system that fails to teach legal practitioners who will work under extreme stress to cope with that stress. The present inquire and exclude approach may actually disserve the public because it discourages students from taking advantage of the free mental health resources made available by the schools.

C. Comparing Costs and Benefits

When comparing the costs and benefits of the present approach, the costs outweigh the benefits, primarily because the approach is largely ineffective. The protection that the inquire and exclude approach gives to the public is limited to the very few applicants who are excluded on the basis of mental and emotional unfitness. The inquire and exclude approach prevents those who are not excluded from preparing for the stress of the practice. To be effective, the selection system must encourage admitted applicants to prepare for the stress of practice. The danger to the public arises not only from applicants who are unfit, but from applicants who are mentally and emotionally unprepared for practice, and who will, therefore, become unfit when subjected to the stress of practice.

III. Possible Responses to the Conflict Between Inquiry and Treatment

A. Justifying the Conflict: Intensifying the Inquiry

One possible way to improve the current inquire and exclude approach is to make an even more intrusive investigation into applicants' back-

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83. Although mastery of information and experience are important for personal growth, greater self-awareness can be equally vital. Without such awareness, the unsure student may quickly begin to sacrifice his values and sense of self for an image of "competence" and "mastery", instead of seeking to develop strength and integrity simultaneously.

Himmelstein, *Reassessing Law Schooling: Towards a Humanistic Education in Law*, Humanistic Education in Law 35 (1980) (footnote omitted).

grounds. This is the strategy now being used in Florida, where an intensive investigation is made into all applicants' backgrounds.[84] As has been demonstrated, a detailed inquiry is made into counseling and other mental health treatment. That inquiry is more intensive today than it was several years ago.[85]

The intensified inquiry motivated us to become involved in efforts to convince the examiners that their approach should be reexamined. We began by enlisting the support of Dean Mary Doyle of the University of Miami School of Law. She was instrumental in arranging a meeting between interested Florida deans and counseling center representatives and the Florida Board of Bar Examiners in 1987. At that meeting, Dean Doyle and Dean Frank Read, who was then Dean of the University of Florida College of Law, expressed their concerns to the Board. A committee of bar examiners and representatives of our group was established, and further discussion occurred. Over time, we developed a draft of this Article and proposed revisions to the questions on the Florida Bar Application designed to limit the examiners' inquiry. We discovered in June, 1990, when the bar examiners met with the Florida law school deans, that the examiners had decided to amend the bar application to expand the present inquiry. The revised application will ask applicants to disclose all counseling, not just regular counseling. Thus, future applicants will not be able to meet with a psychologist on even one occassion without reporting it to the bar.

The intensified inquiry concerning mental health reflects the examiners' concern that a significant number of applicants are afflicted with psychiatric disorders.[86] That conclusion seems inconsistent with the counseling center data discussed earlier, which suggests that few students who seek counseling are seriously disturbed.[87] Nevertheless, there are indications that the general counsel of the Florida Bar Examiners believes

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84. An average of 35 to 40 written inquiries are mailed out in connection with each bar application. If information suggests the need for further information, it is collected over the phone or through a special investigator. *Id.* at 18.

85. Prior to 1985, the follow-up inquiry sent to therapists stated only that "[t]he Board would be most grateful for your analysis of this applicant's condition, along with a description of the treatment afforded and your prognosis in this case." Letter from the Florida Board of Bar Examiners, with applicant reference omitted, on file with the authors. The letter was then expanded to include five of the seven items now included, *supra* note 43, then it was expanded to its present form.

86. An article written by the General Counsel for the Florida Board of Bar Examiners holds the Florida approach up as a model and counsels that "a significant number of bar applicants have psychiatric disorders. If a bar examining authority is not seeing any applicants with these problems, then it is suggested that such authority is not looking very hard." Pobjecky, *supra* note 23, at 16.

87. *See supra* note 79 and accompanying text.

that a significant number of bar applicants and attorneys are afflicted with psychiatric problems.[88] This concern does not find support in the number of applicants actually excluded from admission on fitness grounds,[89] the number of applicants admitted on a probationary basis,[90] or the number of lawyers disciplined in connection with psychiatric problems.[91]

The unsubstantiated belief that significant numbers of applicants have psychiatric problems may have an effect beyond its impact on the examiners' choice of approach. It also raises concerns about the examiners' bias during the investigative process. Given the examiners' apparent willingness to make their own diagnosis of individuals who have seen therapists,[92] the belief that significant numbers of applicants have psychiatric problems could lead the examiners to diagnose applicants as having psychiatric problems when they do not. This could lead to long and expensive delays in admission, even when applicants are eventually admitted.

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88. Pobjecky, *supra* note 23, at 14-15. He appears to base this conclusion upon some preliminary data gathered in an epidemiological study discussed in Freedman, *Psychiatric Epidemiology Counts*, 41 ARCHIVES OF GENERAL PSYCHIATRY 931 (1984). That article reported preliminary findings of a survey done by the National Institute of Mental Health. That survey used a structured interview administered by lay personnel, was conducted on the general population, and looked at a range of disorders, many of which would not affect fitness to practice law. In fact, although the General Counsel cites figures from the study that place the prevalence of psychiatric disorders in various populations from 15 to 38% or higher, the study upon which these figures are drawn itself indicates that the prevalence of more serious problems is much lower, for example, six to seven percent for substance abuse disorders and one percent for schizophrenia. *Id.* at 932. Also, the fact that bar applicants have been able to complete law school successfully demonstrates a level of competence not necessarily shared by the general population. Elliston, *supra* note 2, at 14 ("the law school program is sufficiently demanding that those who are mentally unfit are unlikely to complete it"). Therefore, the cited data does not support the conclusion that a significant number of bar applicants and attorneys are afflicted with psychiatric problems. In fact, the author of the article cited by the General Counsel cautioned:

> Unfortunately, if epidemiology describes a trend, someone searching for a scapegoat or reform will surely feast unseemly upon the finding! In fact, historical perspective documents the use of epidemiology to enhance patient care or, tragically, to dispatch those deemed undesirable.

Id. at 933.

89. One observer has estimated that about 10 applicants are denied admission on fitness grounds each year in Florida. Green, *supra* note 16. The number denied for psychiatric problems is, therefore, probably even smaller.

90. Twenty-six conditional admissions, not all for psychiatric problems, were made in Florida between December 4, 1986, when the rule authorizing such admissions was added, and February, 1989, when the article reporting that statistic was released. Pobjecky, *supra* note 23, at 21.

91. The examiners' General Counsel cited three reported Florida cases. *Id.* at 15.

92. *See supra* note 55 and accompanying text.

Even if it were true that the examiners are besieged with applicants who suffer from psychiatric disorders, the decision to address the problem by intensifying the inquiry is not sound. It is unclear whether a more intensive inquiry would discover more unfit applicants. Given the greater costs of an intensified inquiry, a more intrusive inquiry could do more harm than good. Because a more intensive inquiry does nothing to prepare those who are admitted to the bar for the practice of law, the possible benefits available appear to be quite limited.

B. Minimizing the Conflict: Limiting the Inquiry

Another possible response to the problems raised earlier is to modify the inquire and exclude approach to make a less intrusive inquiry. A less intrusive inquiry might discourage fewer applicants from seeking treatment, and might pose less interference with the treatment of applicants who have sought treatment.

Several ways exist to limit inquiries. First, inquiries about counseling could be limited to situations in which applicants have made a specified number of visits to a psychiatrist or psychologist. A second, bolder, approach would limit inquiries to only those circumstances in which evidence of more serious problems exists independent of the mental health treatment. Such an approach rejects the current use of counseling as an indicator of unfitness, and encourages applicants to use counseling to solve their problems before they get out of hand. Such a limitation could raise concerns about the thoroughness of the examiners' inquiry, but the benefits of the approach may outweigh its limitations. A third way to limit inquiries is to limit the substance of the inquiries about applicants made to counselors.

Some examiners have limited counseling inquiries to situations in which counseling has continued beyond a specified number of visits. Although the motivation behind this limitation on the inquiry is commendable, the results are unsatisfactory. For example, in Florida, the examiners have limited their inquiries to applicants who have undergone "regular" treatment. Regular treatment is defined in the Florida Bar Application as four visits to a psychologist or psychiatrist within a twelve-month period. Although such limitations may have been designed to permit students to have freer access to counseling services, they may not have that effect. The requirement that isolated instances need not be reported suggests that only those who have seen a psychologist or psychiatrist, and have discovered that they do not need treatment, are above suspicion. This may reinforce the applicant's impression that the examiners take a dim view of those obtaining treatment.

Even if regular treatment is defined in broader terms, the requirement that applicants must report counseling on bar applications when it exceeds

a certain specified number of visits will ultimately succeed in removing disincentives to counseling. It is impossible to determine that a set number of visits will not risk interfering with the successful development of coping strategies in some individuals. Brief psychotherapy is time-limited and generally not considered appropriate for more seriously disturbed patients.[93] Despite its designation as specifically "time-limited," even the duration of brief psychotherapy varies. One author notes that practitioners agree on an upper limit of twenty-five sessions.[94] Another author suggests that it should not exceed one year.[95]

Despite this disagreement on the duration of therapy, authorities generally agree on what must take place for effective therapy.[96] In the beginning phase, the therapist must take the patient's history, determine the client's appropriateness for treatment, and, most importantly, develop a therapeutic relationship or working alliance with the patient. The therapist and patient must set realistic goals and expectations. In the middle phase, there is the formulation of the focus of treatment, the parameters of the present problem, and its implications for daily living. The therapist must help the patient become aware of options for coping, and facilitate the implementation of such options. The most important phase is the final or termination phase.[97] It involves summarizing and reviewing the therapy, discussing expectations following therapy, and working through the fears and concerns related to ending treatment.

Clearly, such processes take time. Law students should not be forced to choose, at any point in their counseling, between developing therapeutic relationships and minimizing perceived difficulties with bar examiners. Thus, although the decision to revise the bar application by increasing the number of counseling visits that are allowed before reporting is required may be an improvement over present practice, it is not an ideal solution. The student who attends a large number of counseling sessions may actually be more well-adjusted as a result of those visits than the student who dropped out after only a few visits. Any maximum imposed on the number of visits could potentially interfere with the orderly course of treatment.

A bolder approach might attempt to deal with the problems that have been discussed by focusing the inquiry on serious life problems,

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93. Sifneos, *The Current Status of Individual Short-Term Dynamic Psychotherapy and Its Future: An Overview*, 38 AM. J. PSYCHOTHERAPY 472, 473 (1984).

94. Koss, Strupp & Butcher, *Brief Psychotherapy Methods in Clinical Research*, 54 J. CONSULTING & CLINICAL PSYCHOLOGY 60 (1986).

95. Sifneos, *supra* note 93, at 475.

96. Reich & Neenan, *Principles Common to Different Short-Term Psychotherapies*, 40 AM. J. PSYCHOTHERAPY 62, 65 (1986); Sifneos, *supra* note 93, at 473-78.

97. J. MANN & R. GOLDMAN, A CASEBOOK IN TIME-LIMITED PSYCHOTHERAPY 12 (1982).

rather than on the applicants' use of mental health resources to cope with less serious problems. If serious life problems exist, applicants could be asked whether they sought treatment for those problems. This approach is better than one that asks about treatment to discover life problems, because it does not inquire about counseling in cases where no serious life problems exist. If such an approach were used, most counseling would remain confidential from the examiners, thus benefiting the treatment environment. Also, this approach encourages treatment, and thus sends the applicant the right message. If such a dynamic could be established, applicants would not be as discouraged from seeking treatment.

This approach should not make a significant difference in the number of applicants excluded. Few are excluded under the current approach. If examiners believe applicants should be asked whether they have undergone serious mental health treatment, then the bar application should ask only about such treatment, being careful to exclude counseling. For example, examiners could ask applicants whether they were hospitalized or treated with psychotropic drugs. Such an inquiry would still permit most counseling to remain confidential.

Another possible modification of the current approach is to make the follow-up inquiry less intrusive. The use of a more general letter of inquiry could avoid many of the concerns raised by more specific inquiries. A letter that requests only the reasons the applicant sought treatment, a description of the treatment, and its outcome would allow the substance of the treatment to remain more confidential.

These proposals are all compromises, and none are entirely satisfactory. The proposed limitation on inquiries concerning counseling still permits inquiries in some cases, so it will not entirely remove the chilling effect. However, it will substantially improve the current environment without depriving the examiners of necessary information. Similarly, even a modified inquiry will have some effect on the nature of the therapy, but the less intrusive inquiry suggested here is an attempt to strike a balance between the interests involved. The less intrusive inquiry is more sensitive to the real needs of applicants and the real needs of the bar examiners in making admission decisions.

C. Avoiding the Conflict: Inquiring Only Through the Administration of Psychological Tests

A third possibility is to use psychological testing to conduct the examiners' inquiry. This approach might provide an opportunity to avoid the conflict between the inquiry and the benefits of treatment, because the inquiry could be made through the administration of a psychological test to all potential applicants. The testing approach would be designed to screen applicants for mental or emotional dysfunction.

Psychological testing solves many of the problems of the inquire and exclude approach. First, it would allow the approach to be administered more fairly because the test would be given to all applicants, rather than to only a few. Second, psychological testing would be fairer because the examiners would need to define mental and emotional fitness in order to design an appropriate test. The resulting test would reflect this shared understanding of fitness. Third, the use of psychological testing could enable examiners to identify applicants with serious problems who have never sought treatment, thus identifying a greater number of problem applicants than the inquire and exclude approach. Psychological testing would not interfere with treatment because it would permit examiners to inquire about mental and emotional fitness without necessarily inquiring about treatment. In fact, it might encourage treatment because individuals might be motivated to prepare for the test through counseling. For this reason, the testing approach is less intrusive. However, testing might also be more intrusive because all applicants would be asked probing questions. The concept of using standardized tests to determine applicants' real world abilities is not foreign to the examiners. Administration of a standardized psychological test to determine mental and emotional fitness parallels the examiners' use of the bar examination to assure competence.

Despite these positive features, there are some serious problems with this approach. Rather than discuss the problems abstractly, the problems with the most widely used psychological test will be discussed. Those problems will be discussed at some length because such difficulties are typical of tests that assess the bar applicants' mental and emotional fitness. The Minnesota Multiphasic Personality Inventory (MMPI) is the most widely used psychological test in the United States.[98] The test is easy to administer since it is a self-report, true/false inventory that can be computer scored and interpreted.[99] The examiners might consider using the results of the MMPI or some similar test. However, the test has some difficulties.

The MMPI was developed for adult psychiatric patients.[100] Its development involved selecting items that could discriminate reliably between various psychiatric groups and between a psychiatric group and a normal group.[101] In other words, items were selected for inclusion in

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98. J. GRAHAM, THE MMPI, A PRACTICAL GUIDE 71 (1987) [hereinafter GRAHAM]. *See generally* Lubin, Larsen & Matarazzo, *Patterns of Psychological Test Usage in the United States: 1935 to 1982*, 39 AM. PSYCHOLOGIST 451 (1984).

99. A detailed discussion of the dangers of automated test interpretations is beyond the scope of this Article. For a more detailed discussion see Mattarazzo, *supra* note 50, at 14-24.

100. GRAHAM, *supra* note 98, at 81.

101. *Id.* at 5.

a scale if groups known to differ on the characteristics suggested by the item actually responded differently to the item. Ten clinical scales were developed in this fashion. Four validity scales, intended to detect test-taking attitudes, were also developed.[102] A high score on a particular MMPI clinical scale indicates the presence of pathology.

The normal sample used in constructing the MMPI included 724 persons who were visiting a Minnesota hospital.[103] Thus, normal responses to the MMPI were determined by the responses of this group. The average subject was white, about thirty-five years old, married, living in a small rural town, and working in a skilled or semi-skilled trade. Normal responses for those individuals are unlikely to correspond to normal responses for a law student. For example, scale six is the paranoia scale. High scores on this scale suggest clinical paranoia. Individuals with high scores feel mistreated, angry, suspicious, are guarded, use rationalizations, and are unwilling to discuss emotional problems. These characteristics are not uncommon in law students, and are certainly much more prevalent in the law school population than in rural Minnesota. Does that mean that law students are clinically paranoid?

Another scale that is subject to potential misinterpretation in a law school population is the K validity scale. Research with the K validity scale, one of the four scales that address the validity of the overall protocol, has shown that higher levels of education and socioeconomic status are associated with higher, and hence, more pathological, scores.[104] What does it mean when a law student gets a high score? Is that in line with what other law students would score? Does it demonstrate that the law student is trying to fake a good profile?[105] Is the student lacking in self-insight? These questions cannot be answered by a computer. Any test adopted to test law students would have similar limitations. Designing a test specifically for this purpose would be extremely difficult because of the technical difficulties and the problem of defining unfitness.

Further exploration of this option requires examination of test construction. Leovinger wrote the classic article on psychological test construction in 1957.[106] The following discussion will be based on her work. According to Loevinger, construction and validation of a test requires

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102. *Id.* at 6.

103. *Id.* at 73.

104. *Id.* at 25.

105. ANASTASI, *supra* note 51, at 34. Faking a good profile involves presenting oneself in the best possible light, generally by denying symptoms and problems. Law students may tend to respond in ways that they believe will not put their fitness in question.

106. Loevinger, *Objective Tests as Instruments of Psychological Theory*, 3 PSYCHOLOGICAL REPORTS 635 (1957).

three components. The first step, the substantive component, requires that items be derived from a theoretical framework. This step requires the development of a framework for determining what constitutes fitness and unfitness to practice law. Items for the test are derived from this framework. The second component pertains to the degree to which the structure of the test, its scales, and items correspond to the expected model. Are the scales internally consistent? Do they correlate with each other as expected? Is the test measuring a construct that should be reliable over time and, if so, does the test possess such reliability? Are the factors underlying the test meaningful given its theoretical framework? The third component addresses the degree to which the test corresponds empirically to some nontest measure of the traits or characteristics being studied. At this step, the criteria of fitness to practice would have to be operationalized to determine whether the test is really measuring the intended constructs. Further studies are necessary to determine if the test has any predictive validity. All of the studies would have to be replicated in order to be sure that the test is indeed valid for the intended purpose. The design of a test for bar applicants would be a difficult, expensive, and time consuming project.

Even the revision of an already existing test, like the MMPI, would require significant time, expense, and effort. Even after that revision, the test would not be specifically designed to test fitness for the practice of law. The revision of a test like the MMPI for such use would require the gathering of a large representative sample of law students from across the country to determine what a "normal" law student would look like on the MMPI. Once norms were established and cross validated on another sample, studies would have to be done to determine that the scores indeed reflect something relevant to the practice of law. Finally, further study would be necessary to determine if the scores have any predictive value.

Another serious problem with such a test is how applicants would approach it. The test is unlikely to yield an accurate picture of the applicants' functioning because they know when they take the test that the results will impact their ability to become licensed to practice. Even if the test is sophisticated enough to detect a "fake good" response set, the scores would be useless for evaluation or prediction.[107]

Even if these problems could be overcome and a "perfect" test could be designed, examiners could not rely on it to provide definitive answers. The use of a single psychological test without the benefit of context or other test data is simply bad practice.[108] Psychological tests,

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107. GRAHAM, *supra* note 98, at 18.
108. Matarazzo, *supra* note 50, at 22.

especially personality tests, must be used with great care because there is much room for error even when a well designed test is used.[109] Applicants could appear overly pathological or not pathological enough, and either result would pose a problem for the examiners. Although a test might be useful in identifying severe psychotics, students with such serious thought disorders seem unlikely to get through law school undetected anyway. Thus, the prospect of using psychological tests is not promising. Therefore, there appears to be no realistic way exists to avoid the conflict inherent in the inquire and exclude approach.

IV. Prioritizing Conflicting Goals

The inquire and exclude approach conflicts with the goal of encouraging applicants to take advantage of mental health resources. The conflict may be minimized, but not eliminated. This conflict has serious consequences. The decision to use the approach, in view of its alleged effect on applicants' ability to take advantage of mental health resources, should be a conscious choice based on weighing competing concerns.

A. The Recommended Resolution: Priority for Prevention and Treatment

How should examiners respond to their concern about the mental and emotional fitness of applicants? We suggest that given the realities of law practice today, they should adopt an approach that encourages all applicants to prepare for the stress of practice. If the stress of practice is not managed well, it may lead to problems like alcoholism and drug abuse, which pose a serious threat to lawyers and clients alike.

The problem's solution requires the assistance of bar examiners, but the examiners cannot solve it alone. Even if the examiners' inquiry is modified so that it does not discourage applicants from obtaining counseling, many law students will still hesitate to use counseling services. The social stigma associated with counseling is especially strong among law students. Law students are less likely to use counseling services than other students.[110] Law students are four times less likely to use counseling services than medical students.[111] The study finding this disparity suggests that counseling resources are emphasized to incoming medical students.[112] Another reason may be the competitive nature of the law students' environment, which allows little room for personal disclosure or emotional

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109. Anastasi, *supra* note 51, at 524.
110. Heins I, *supra* note 73, at 176.
111. Heins II, *supra* note 73, at 521.
112. *Id.* at 523.

vulnerability.[113] Finally, it may reflect an attempt to conform to the perception of lawyers as shrewd, independent, and self-sufficient.[114]

Nevertheless, a change in the examiners' approach can lead the way. Once law students realize that the use of counseling services will not raise the question of their fitness, professors, deans, and other school personnel will be free to encourage students to take full advantage of the free resources that usually exist. The combination of change in the examiners' approach with the adoption of primary prevention techniques likely will encourage further utilization.

B. A Proposed Framework

We suggest a shift in focus from identifying and excluding unfit applicants to promoting mental and emotional fitness among all applicants. This emphasis is analogous to the shift Americans have made recently in the area of physical health. A focus on physical wellness is designed to prevent heart disease and other physical ailments, and recognizes that prevention is preferable to the alternatives available after the onset of disease or disability. Similarly, a focus on promoting fitness will require that the system pay more attention to the mentally healthy, rather than focusing on individuals who have already demonstrated an inability to cope.

The importance of prevention is recognized in the mental health field. In 1959, the Joint Commission on Mental Illness and Health concluded that the growing demand for mental health services necessitated a shift from remediation to prevention in order to meet peoples' needs.[115] A framework of prevention was borrowed from public health literature, and that framework was used to conceptualize possible approaches to psychiatric treatment.[116] That framework will be used here to organize the alternatives that together can be used to promote the mental and emotional fitness of applicants.

The framework distinguishes among primary, secondary, and tertiary prevention.[117] Primary prevention is based on the idea that the entire population, particularly populations at risk for problems, can benefit from services. The goal is to promote growth and emotional well-being. Such strategies would reduce the incidence of problems for all people.

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113. Dickerson, *supra* note 78, at 89.

114. Kobasa, *Commitment and Coping in Stress Resistance Among Lawyers*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 707 (1982).

115. G. ALBEE, MENTAL HEALTH MANPOWER TRENDS 254 (1959).

116. G. ALBEE & J. JOFFE, PRIMARY PREVENTION OF PSYCHOTHERAPY xii (1977).

117. R. PARSONS & J. MEYERS, DEVELOPING CONSULTATION SKILLS: A GUIDE TO TRAINING DEVELOPMENT AND ASSESSMENT FOR HUMAN SERVICES PROFESSIONALS 2 (1984).

Secondary prevention focuses on problems that have begun to appear. The goal is to shorten the duration and impact of problems by intervening at an early point. Tertiary prevention involves the implementation of techniques designed to reduce the consequences of severe problems once they have already occurred.

Using this as a framework, alternatives to the identify and exclude approach currently employed by the bar examiners will be examined. When applied to the question of fitness to practice law, tertiary strategies would focus primarily on those already admitted to practice, although applicants with obvious difficulties also would be included in this approach. A tertiary approach necessitates developing a system that monitors the practicing bar more carefully. It might also involve delivering mental health services and supervising lawyers' practices when problems are discovered.

Opportunities for secondary prevention, which focuses on early identification and intervention with problems that have just begun to appear, abound during law school. During law school, under the stress described above, the first signs of difficulty will begin to show. Early intervention is preferred because it results in more successful treatment. Furthermore, most law students have access to free services through their university counseling centers. Such centers are uniquely suited to early intervention because university counselors are familiar with the particular demands of law school, and can deliver services uniquely suited to law students. Students who begin to show difficulties can be referred for help immediately, and can learn coping strategies to help them in practice. Once lawyers are admitted to the bar, treatment might be more difficult because habits are more firmly established. Also, when lawyers discover that counseling services from private providers not affiliated with the university probably cost more than $100.00 an hour, young lawyers may decide to spend their money on types of unhealthy strategies described above, rather than on the counseling they may need.

The implementation of a sound secondary prevention strategy requires changes in the current approach. The bar examiners' current inquiry would have to be modified so that it does not discourage applicants from seeking counseling, and so that it does not disrupt the counseling that occurs. An approach should be adopted that balances the interests involved. It should attempt to protect the fact and substance of counseling from disclosure, and at the same time permit the examiners to obtain and review information that suggests the existence of serious mental illness.

Primary prevention techniques go beyond secondary approaches because they are directed at the entire population at risk, not merely at those who do develop problems. As such, they are oriented toward actively promoting better mental and emotional fitness in the entire law

school population. As law students are taught legal skills, they should also be taught coping skills and an increased adaptive capacity. Such attempts at primary prevention are noticeably absent from the standard law school curriculum.

Primary prevention might take a variety of forms. The law school curriculum might be expanded to include coursework designed to teach students healthy coping strategies. One focus could be stress management. Such a course could familiarize students with the importance of exercise, diet and nutrition, positive thinking, and time management, and could include instruction on topics such as study skills, memory enhancement devices, and exam preparation.[118] The course could also focus on communication skills, assertiveness training, conflict resolution, negotiation, and mediation skills; all are useful on both personal and professional levels. Workshops could be offered for law students and their "significant others" to prepare them for the stress on their relationships that law school will create. Human relations training workshops could teach students to develop a more flexible interpersonal style and help them develop self-confidence and self-esteem.

Limited experimentation with stress management training has yielded encouraging results. In one study, students volunteered to participate in a six-session seminar on personal stress management skills including self-relaxation training, schedule planning, priority-setting, leisure time planning, and cognitive modification techniques.[119] The results of the study were that:

> [s]ubjects showed pre- to post-treatment improvement on a variety of measures that included their knowledge about stress, personal ratings of stressful situations, and their daily activity schedules. In contrast, a control group showed no improvement and worsened in reported levels of personal stress.[120]

Although some individuals recognize the need for this type of instruction, other individuals wonder whether it is necessary to make lawyers more paranoid, hostile, and obsessive-compulsive to prepare them for adversarial conflict.[121] Thus, one problem is that all individuals may not share the goals of these primary prevention strategies. Another difficulty is that law faculties are not prepared to teach in these areas. This is easily solved by hiring qualified professionals to teach these courses.

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118. Dr. Marty Peters of the University of Florida teaches such a course.

119. St. Lawrence, McGrath, Oakley & Sult, *Stress Management Training For Law Students: Cognitive Behavioral Intervention*, 1 BEHAVIORAL SCI. & L. 101 (1983).

120. *Id.*

121. Benjamin, *supra* note 74, at 251.

A primary prevention approach is not inconsistent with a secondary approach, which would involve making counseling available to those who may need it. In fact, the promotion of good mental health as a regular part of the curriculum is likely to significantly reduce the resistance law students may have to utilizing free counseling services. Finally, the approach is not inconsistent with some continuing effort to identify those whose backgrounds reflect evidence of more serious problems. In fact, the instructors in prevention-type courses would be in a good position to identify students who might benefit from counseling and could direct them there. Students who are not suited to the practice of law because of serious mental and emotional problems might be counseled away from that career choice. The real benefit of primary prevention is that it focuses on all possible bar applicants, helping them all to become better adjusted. Such an approach directly protects the public by creating healthier practitioners through more comprehensive law school training.

V. A Proposed Solution

Bar examiners have the ability to revise their inquiries to facilitate evaluation of the mental fitness of applicants, while discouraging fewer applicants from seeking counseling. We conclude that some limitation on inquiries about counseling and treatment is necessary. What inquiry will permit bar examiners to encourage the development of coping strategies in law school without endangering the public by admitting mentally unfit applicants? We suggest that the examiners should focus their initial inquiry on whether applicants have had serious life problems, rather than on whether they have taken advantage of mental health resources like counseling. The indication that an individual suffered serious life problems should raise the question of fitness. The fact that an individual has sought and obtained counseling should not raise the question of fitness. Applicants who indicate that they have experienced serious life problems should be asked if they have sought mental health treatment. If so, inquiries can be made into their treatment, including counseling.

Examiners might combine the inquiry we suggest with limited inquiries concerning mental health treatment. The bar application should make clear that the examiners do not want the existence of counseling disclosed, no matter how many visits to a counselor are involved, unless the applicant has experienced serious life problems. The application should also make clear that a limited inquiry will be made into the substance of counseling. The application could also ask about more serious mental health treatment, such as whether the applicant has ever been hospitalized for mental illness, or participated in a drug or alcohol treatment program, as an inpatient or as an outpatient. The application could also ask whether the applicant has ever been adjudicated incompetent or insane.

Inquiry into these particular circumstances may prove as useful for examiners' purposes as more general inquiries into counseling, but they will not cause as severe a chilling effect on counseling as the more general inquiry causes.

This new and narrower focus must be communicated clearly to applicants. To accomplish that goal, vague or ambiguous language in bar applications must be removed, and ideally examiners should explicitly encourage applicants to take advantage of counseling while in law school. Bar applications should also be rewritten to avoid questions regarding facts which are unknown to the applicant. For example, an application that asks an applicant about a health care professional's diagnosis, especially in the form of, "Were you ever diagnosed as," creates problems for the applicant. Usually, applicants are not told that a diagnosis was made or the nature of the diagnosis. When the inquiry is limited to known facts, the chances of misunderstandings are lessened.

The suggested approach is a compromise and, like all compromises, is both positive and negative. On the positive side, it will make counseling more available and will protect the integrity of some treatment. Thus, mental and emotional fitness will be encouraged. On the negative side, the modification recommended does not solve all the problems of the inquire and exclude approach. Nevertheless, we hope that our proposed compromise, although less comprehensive than another more radical approach might be, has a more realistic chance of adoption by the examiners.

We do not expect that examiners will quickly embrace our proposal. Examiners may be concerned that applicants will not be candid in responding to questions about serious life problems, and believe that applicants would be more candid about treatment, because definitive records of treatment exist while definitive records of serious life problems may not exist. Even if the fear of detection is different, this can be overcome by the examiners' substantial experience in looking for life problems. Bar applications typically contain many questions that do not directly ask about mental problems or mental fitness to practice law, but that will yield valuable information bearing on the existence of significant life problems. For example, answers to questions about whether the applicant has been arrested or has had difficulty holding a job may raise concerns about fitness. The limitation that we suggest will not obscure such information from the view of bar examiners.

The examiners may also object to our compromise because applicants may discuss problems with drugs and alcohol during counseling, and examiners want access to that information. Drug and alcohol problems are fast becoming a primary focus of bar examiners. As one commentator notes:

> In the 1950's and early 1960's bar examiners looked for communists and fornicators. In the late 1960's and early 1970's they looked for hippies and pot smokers. Then came the era of cocaine, homosexuals, bankruptcy and unpaid student loans. Today alcoholism and other drug abuse is on the ascendency.[122]

The argument that examiners must look into the substance of counseling for this reason ignores the fact that such inquiries will drive students away from counseling. By limiting their inquiries to drug and alcohol treatment programs, the examiners will still detect individuals with serious problems, but will not discourage students from learning coping strategies that do not involve drugs and alcohol.

If individuals learn healthy coping strategies through counseling while they are in law school, they are less likely to resort to unhealthy coping strategies, such as drug and alcohol abuse, under the stress of practice. Drug and alcohol abuse among lawyers are significant concerns.[123] In Florida, the bar is "cracking down" on drug-abusing lawyers, and is the first state to adopt a policy of suspending lawyers for ninety-one days and then placing them on probation if the bar finds they have used drugs.[124] This penalty may be reduced if lawyers complete rehabilitation, or increased if they refuse treatment or if their actions harmed clients.[125] Efforts to direct drug-abusing lawyers into treatment would be complemented by action to encourage bar applicants to learn coping strategies that do not include alcohol and drugs while they are still in law school. Our compromise removes barriers to the counseling that could provide support. It allows bar applicants to improve their mental and emotional fitness while they are making other preparations for practice.

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122. McFarlain, *supra* note 16, at 34.

123. It has been estimated that there are between 72,000 and 130,000 lawyers nationwide who drink beyond their control. Hickey, *Attorney Alcoholism,* WASH. LAW., Mar./Apr. 1990, at 34, 36. Today, virtually every state has some kind of lawyer assistance program. *Id.* at 36-37. "Although far less prevalent than alcoholism, illegal substance abuse is pervasive. Even in the most profitable and prestigious white-shoe firms, lawyers have been enticed and then entrapped by white powder, colored pills, and needles." Safian, *High Times On The Fast Track*, AM. LAW., Mar. 1990, at 75.

124. *Bar Cracks Down on Drug-Abusing Lawyers*, MIAMI REV., Mar. 23, 1990, at 10. "The new policy will be used when disciplining lawyers who personally use drugs, but are not accused of sale or distribution. This includes lawyers who are never prosecuted or convicted of such activity, but whose activities are revealed to the Bar." *Id.*

125. *Id.*

Time For an Intermediate Court of Appeals: The Evidence Says "Yes"

STEPHEN SAFRANEK*

I. INTRODUCTION

We have "more variations of [federal law] than we have of time zones."[1] One source of these variations is the conflict between circuits caused by their differing interpretations of federal laws.[2] Investigations by various committees have resulted in several proposals to solve the persisting and increasing number of intercircuit conflicts.[3] Recently, these conflicts caused Senator Thurmond to introduce a bill which would create an intercircuit panel.[4] This bill, identical to the one he introduced in the 100th Congress,[5] seeks to create an intercircuit panel somewhat along the lines advocated by both the Freund and the Hruska commissions nearly fifteen years ago.[6]

Since the Freund and Hruska commissions released their reports, numerous other proposals have been forwarded regarding the necessity for and structure of such a court. Currently, the Federal Courts Study Committee's (Study Committee) agenda includes such a report.[7] Previously submitted proposals advocated the creation of such a court chiefly

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1. Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1408 (1987).

2. *Id.* at 1404. One of the prime roles of the Supreme Court is to ensure uniformity of federal law. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709, 1713-14 (1978). *See also* Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 458 (1984); *Rx for an Overburdened Supreme Court: Is Relief in Sight?*, 66 JUDICATURE 394, 395 (1983) (remarks of Prof. Daniel J. Meador).

3. U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), *reprinted in* 67 F.R.D. 195 (1976) [hereinafter HRUSKA REPORT]; FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), *reprinted in* 57 F.R.D. 573 (1972) [hereinafter FREUND REPORT]; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (April 2, 1990) [hereinafter STUDY COMMITTEE].

4. S. REP. No. 93, 101st Cong., 1st Sess. (1989).

5. S. REP. No. 239, 100th Cong., 1st Sess. (1987).

6. *See infra* Part II.

7. *See* STUDY COMMITTEE, *supra* note 3, at 109.

to reduce the Supreme Court workload.[8] The Freund and Hruska commissions found that courts have interpreted federal law in varying ways and that this inconsistency has caused national problems that the Supreme Court seems incapable of resolving.[9]

This Article presents a new proposal demonstrating the need for an intercircuit court. My task in this Article is to reevaluate the arguments for and against the creation of a court to resolve inconsistencies in national law, and to determine whether the arguments for uniformity lead to the conclusion that an intermediate court of some type would benefit the Supreme Court, the appellate courts, and most importantly, the citizenry.[10] In addition, I will add new reasons supporting the creation of an intercircuit panel. These new reasons extend the arguments set forth in previous proposals by showing that the circuits are unable to resolve intra- or intercircuit conflicts via en banc proceedings. An intermediate panel, such as the one I propose in this Article, would not only eliminate the conflicts between circuits, thus reducing demands on the Supreme Court's time, but would also reduce the need for en banc proceedings before the circuit courts, freeing them to decide more cases, or to spend more time deciding the same number of cases. In short,

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8. *See* HRUSKA REPORT, *supra* note 3, at 209; FREUND REPORT, *supra* note 3, at 577-84. The Court's increased work load is due, in part, to the increased supervision of judges by the Supreme Court. The Court's supervisory responsibility has grown from 179 judges in 1925 to 430 judges in 1970 and 742 judges in 1987. Baker & McFarland, *supra* note 1, at 1402. This growing supervision alone should warn us that the Court might become overburdened.

The underlying premise of these commissions is that "[t]he function of the Supreme Court is . . . not the remedying of a particular litigant's wrong, but the consideration of cases whose decisions involve principles, the application of which are of wide public or governmental interest." Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925). Chief Justice Vinson later echoed this view saying that "[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Vinson, *Work of the Federal Courts*, 69 S. CT. v, vi (1949). They held this view even though they were not faced with as great a degree of disparity between circuits in interpreting federal law as is apparent today. *See* U.S. CONST. art. III, § 2.

9. *See* HRUSKA REPORT, *supra* note 3, at 206. A perfect example of differing interpretations that had to be addressed by the Supreme Court is found in Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628 (2d Cir. 1989), *cert. granted*, 110 S. Ct. 320 (1989), and Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. and N.J., 819 F.2d 413 (3d Cir. 1987), *cert. denied*, 484 U.S. 953 (1987). These courts' differing interpretations had to be redressed by the Supreme Court. *See* 129 CONG. REC. S1947-48 (daily ed. Mar. 1, 1983) (remarks of Senator Dole).

10. The creation of such a court would necessarily reduce the Supreme Court's role as a corrector of error in interpreting federal law. However, the Supreme Court now seems incapable of fulfilling this role. *See* Kurland & Hutchinson, *The Business of the Supreme Court, O.T.*, 50 U. CHI. L. REV. 628, 629 (1983).

an intermediate panel could ensure consistency in the interpretation of federal law within and among circuits.[11]

Before elaborating on a proposal, I must first set forth the groundwork for it. In Part II of this Article, I will examine two formative proposals that advocate the creation of an intercircuit court and the Federal Courts Study Committee's recent proposal. In Part III, I examine various arguments made by those opposing formation of such a court and more recent proposals for such a court. I also examine proposals which argue that the same results could be achieved more simply than through the creation of an intermediate court of appeals. In addition, I explore how each differing proposal would solve some identified problems, but not others. In Part IV of this Article, I show that, even within circuits, conflicts in law are left unresolved because of the cumbersome nature of en banc proceedings. This Part briefly considers the historical development of en banc hearings and considers their usefulness in solving intra- and intercircuit conflicts. In Part V, I propose an intermediate court and explain why my proposal solves many problems earlier proposals do not solve.

Initially, I realize that any proposal I make may be long in coming to implementation. However, I am steeled for this wait, remembering that "[t]he 1891 Evarts Act, creating the circuit courts of appeals was passed nearly 100 years after the First Judiciary Act and more than forty years after it was first proposed."[12]

II. Proposals for an Intercircuit Panel: First Explorations

A. Freund Commission

In 1972, the Federal Judicial Center established a panel to study, among other things, the degree of intercircuit conflict in federal law.[13] The Federal Judicial Center charged the panel with the responsibility "to conduct research and [to] study . . . the operation of the courts of the United States."[14] The panel considered the subject of unresolved intercircuit conflicts only because the committee implicitly believed that these conflicts reflected an inability of the Supreme Court to resolve

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11. This Article implicitly accepts the premise that uniform federal law is desirable. It will show that no justification for inconsistency exists. Moreover, the number of conflicts now present, added to the "almost conflicts" revealed in Part IV(C), call for a solution. The Freund and Hruska commissions asserted that this disarray was unquestionable. *See supra* note 9.

12. Baker & McFarland, *supra* note 1, at 1415.

13. *See* Freund Report, *supra* note 3, at 573.

14. *Id.*

issues that it was designed to resolve.[15] The committee believed that these unresolved cases were part of the Supreme Court's nondelegable duties.[16] The number of such cases has become more acute in subsequent years and the justices, pressed for time, are even less likely to resolve them.[17]

The committee's chief proposal was the "creation of a National Court of Appeals which would screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between the circuits."[18] In most cases, this would be the court of final adjudication for appeals.[19] Cases of conflict would be argued, and would "be adjudicated on the merits" by this new court.[20] "Its decision would be final, and would not be reviewable in the Supreme Court."[21]

The primary benefit of such a court is that conflicts among circuits would be resolved by another court, thus freeing the Supreme Court to decide only those cases which are of importance irrespective of whether the cases involve a conflict among circuits.[22] As an added benefit, this new court would resolve conflicts now left unresolved by the Supreme Court.

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15. The panel believed that the Supreme Court is meant to secure the uniform application of federal law. *Id.* at 578.

16. *Id.* at 575. Nevertheless, it seems impossible for the Court to attempt to correct the errors of the courts of appeals and to serve as the ultimate interpreter of the Constitution. *See* Kurland & Hutchinson, *supra* note 10, at 629.

17. Six Justices of the Supreme Court have called for a scheme to reduce their workload. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230 (1982); Marshall, *Remarks at the Second Circuit Judiciary Conference* (Sept. 9, 1982) (available on request from the Public Information Office, United States Supreme Court); O'Connor, Comments on the Supreme Court's Case Load, delivered in New Orleans, Louisiana (Feb. 6, 1983) (available on request from the Public Information Office, United States Supreme Court); Rehnquist, *Are the True Old Times Dead*, (Sept. 23, 1988) (Mac Swinford lecture) (available on request from the Public Information Office, United States Supreme Court); Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982); White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections*, 51 ANTITRUST 275, 280 (1982). Others have also commented on this need. Baker & McFarland, *supra* note 1, at 1401; Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983); Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974); Hart, *The Supreme Court, 1958 Term - Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959). Even though the court has apparently not set as many cases as normal for argument in the 1989-1990 term, this does not change the basic arguments regarding the Court's overload.

18. FREUND REPORT, *supra* note 3, at 590.

19. *Id.*

20. *Id.* at 593.

21. *Id.*

22. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 HASTINGS CONST. L.Q. 375, 381 (1984).

However, it is unclear whether the formation of a court in accord with this proposal would eliminate many cases from the Supreme Court's docket. The Supreme Court now appears willing to let some conflicts within circuits persist, resolving only those conflicts which involve issues it deems of special importance. Therefore, the Court might accept some cases involving conflicts regardless of whether an intercircuit court had acted upon them. Nevertheless, it appears that the Supreme Court accepts cases that involve conflicts only because the conflicts cannot be allowed to persist, not because the issues in the cases are important.[23] The development of the intercircuit panel proposed by the Freund Commission would remove these cases from the Supreme Court's docket.

The other power to be given to the intercircuit court would be the ability either to deny review or to certify a case to the Supreme Court.[24] By giving the intermediate court this power, the Freund Commission suggested that an intermediate court could be given the power to decide which cases the Supreme Court would hear. Although Justice Stevens has suggested that such an alternative would be acceptable,[25] others may be unwilling to give a body other than the Supreme Court this much authority.

Finally, the panel outlined how judges could be assigned to the court. The panel suggested that the court consist of seven judges drawn from the circuits to serve as special judges for a limited time.[26] The problem with this solution is that it could create tension by allowing circuit judges' peers to review their decisions. Circuit judges would be less willing to accept a decision made by their colleagues than they would be to accept a decision made by a superior court.[27]

Several other problems would also face such a court. The size of the panel outlined by the Freund Commission, although not as cumbersome as some of the larger circuits, could complicate the law by resolving cases with special concurrences or dissents, thereby leaving the law vague. Lastly, the number of conflicts unresolved by the Supreme

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23. *See supra* note 9. *See also* Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1102 (1987); Kurland & Hutchinson, *supra* note 10, at 643.

24. FREUND REPORT, *supra* note 3, at 592.

25. *See infra* notes 113-114 and accompanying text.

26. FREUND REPORT, *supra* note 3, at 591. Judges in active service would be listed according to seniority. The judges would be taken from this list, alternating between the senior and junior judges. *Id.* The judges would serve for three years, and two judges from the same circuit could not sit on the court at one time. *Id.*

27. Indeed, this unwillingness to be bound by fellow judges appears to be part of the reason for conflicts between circuits. Judges could freely follow other circuits' decisions. *See infra* Part III(B)(1).

Court (ninety-eight in the 1970-1971 term), a number certain to have grown, and the number of petitions filed for certiorari would overwhelm this court.[28] Therefore, although the Freund Commission made a step in the right direction, its solutions, now over fifteen years old, are obsolete.

B. Hruska Commission

In 1975, the Commission on the Revision of the Federal Appellate System (Hruska Commission) set forth its proposals which included a recommendation for an intermediate court of appeals.[29] This Commission was chaired by Senator Roman Hruska, and took its name from him. Besides recommending the creation of an intermediate circuit, it recommended the publication of internal operating procedures of the circuits,[30] new ways to allow the courts to manage their mounting workload,[31] and other various procedural changes. Most of these recommendations were quickly put into practice.[32]

Nevertheless, the recommendation that the Commission focused upon, and which it urged most strongly, still appears no closer to realization than it was in 1975. The Hruska Commission noted that "[i]t has been urged upon the Commission that intercircuit conflict and disharmony have proliferated to the point where 'jurisprudential disarray' threatens to become 'an intolerable legal mess.'"[33] The Commission found that in the 1971-72 term, the Supreme Court failed to hear ninety-eight cases involving direct conflicts, most of which involved interpretation of federal law.[34]

The Commission's central recommendation was the creation of an intercircuit panel.[35] The Commission recommended that a new court be formed to hear cases only by reference from the Supreme Court or by transfer from the circuit courts.[36] The Commission stated that the Supreme Court could "refer any case within its appellate jurisdiction to

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28. *See* STUDY COMMITTEE, *supra* note 3, at 125. The number of direct conflicts was estimated to be between sixty to eighty. *Id.* The study does not consider conflicts that involve "fundamentally inconsistent approaches to the same issues" to be direct conflicts. *Id.*

29. HRUSKA REPORT, *supra* note 3, at 195.

30. *Id.* at 200-01, 250-62.

31. *Id.* at 201-03, 266-73.

32. Of the four major recommendations, only the creation of the intermediate court has failed to be embraced and acted upon.

33. HRUSKA REPORT, *supra* note 3, at 206.

34. *Id.* at 222.

35. *Id.* at 208.

36. *Id.* at 199.

the National Court of Appeals."[37] The National Court would "then select those cases which it would decide on the merits, and decline review in the others."[38] However, the Supreme Court could require the National Court to dispose of a case on the merits.[39] Cases which come before the Supreme Court on appeal would either be decided by it or would be sent to the National Court to be decided.[40]

The Hruska Commission's report also discussed transfers from the circuit courts to the intermediate court. A case filed before a court of appeals, the Court of Claims, or the Court of Customs and Patent Appeals would be transferable to the National Court in three situations. First, a case would be transferable if it turns on an issue of federal law and "federal courts have reached inconsistent conclusions with respect to it."[41] Second, it would be transferable if it turns on an issue for which prompt adjudication by the intermediate court would outweigh any disadvantage of such swift adjudication.[42] Finally, a case would be transferable if it turns on an issue previously decided by the intermediate court and the extent of that decision needs to be interpreted in the pertinent case.[43] The committee provided some examples of cases which would be appropriate for transfer and set forth some basic principles upon which to develop a transfer procedure.[44] The transfer procedures were to "be fashioned on an individual basis by the . . . courts. . . . The procedures [were to] be designed to minimize both the burdens on the judges and the delay for the litigants."[45]

This new court was to be composed of "seven Article III judges appointed by the President subject to confirmation by the Senate, and holding office during good behavior. It would sit only en banc."[46] It was expected to "decide at least 150 cases on the merits each year."[47]

The benefits of such a court, as well as its shortcomings, are several. First, this structure still requires the Supreme Court to sift through cases and decide which ones are suitable for this new court. Thus, it burdens the Supreme Court to a greater degree than it is currently burdened by asking it to decide which cases are important enough to be decided by

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37. *Id.* at 239.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 242.
42. *Id.*
43. *Id.*
44. *Id.* at 243-46.
45. *Id.* at 245.
46. *Id.* at 237.
47. *Id.* at 246.

this court.[48] If the Supreme Court neglected this responsibility, merely assigning all of the suggested conflicts to the National Court, the National Court would have no time for other business. In short, this court would be incapable of handling the large number of cases it would face under normal conditions. In addition, its size is the same as that suggested by the Freund Commission, and is therefore similarly defective insofar as such a court could often fail to delineate a clear interpretation for a case placed before it.[49]

On the other hand, this court has some particular advantages, including the ability to solve conflicts in the circuits even before they have time to develop. If the circuits willingly send cases to the intermediate court, it could create clear precedent, thereby precluding the development of some conflicts. In addition, the permanent nature of these judgeships, unlike those suggested by the Freund Commission, would provide this intermediate court with prestige and stability; the former would attract judges of the highest caliber, while the latter would help ensure consistency in federal law. Despite these clear benefits, the requirement that the Supreme Court largely screen this appellate court's docket would cause either a reduction in the Supreme Court's capacity to decide cases because of the burden of the screening process or it would cause the appellate court to be overwhelmed by the flood of cases sent to it because the Supreme Court did not carefully screen cases.[50] In either instance, neither the Supreme Court nor the new appellate court would be as effective as it could be under other proposals.[51]

C. Study Committee

The Federal Courts Study Committee recently released its report on and recommendation for the federal courts.[52] The Chief Justice appointed this committee to review the "federal courts' congestion, delay, expense, and expansion."[53] The Study Committee focused only on institutional reforms that could better our federal courts.[54] It recognized that the

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48. Alsup & Salisbury, *A Comment on Chief Justice Burger's Proposal for a Temporary Panel to Resolve Intercircuit Conflicts*, 11 HASTINGS CONST. L.Q. 359, 364 (1984).

49. For a thorough critique see Owens, *The Hruska Commission's Proposed National Court of Appeals*, 23 UCLA L. REV. 580 (1976).

50. The Justices probably would foist this screening process on their clerks. If they did so to a large degree, law clerks, not article III judges, would be deciding what laws are deserving of clarification.

51. *See infra* Part V.

52. STUDY COMMITTEE, *supra* note 3.

53. *Id.* at 3.

54. *Id.*

increasing number of appeals to the circuits and the resultant caselaw made "problematic" uniformity of precedent within and among circuits.[55] After having summarily set forth various proposals for an intermediate appellate court, the Study Committee set forth its own recommendation.[56] Its recommendation was simple: conflicts between circuits should be resolved by having a third circuit decide the conflict en banc.[57]

The Study Committee proposed that when the Supreme Court determines that a conflict between circuits is worthy of national attention, it should refer the case to a court not involved in the conflict, which court will hear the case en banc.[58] This procedure has numerous shortcomings. First, it leaves the resolution of conflicts on the same level of authority as the level at which the conflict was created. Also, under this procedure, every appellate panel will be subject to control by decisions of courts of equal stature. This may lead panels in other circuits to distinguish their cases on narrow grounds because of an unwillingness to be governed by their equals.[59] Secondly, this proposed solution is burdensome. If, as the Study Committee notes, there are at least sixty direct conflicts and numerous indirect conflicts that the Supreme Court does not resolve every year, the Supreme Court could, under this proposal, certify at least sixty cases to intra-circuit panels. This would increase the number of en banc sittings by over fifty percent.[60] The amount of judicial time thus spent on hearing en banc cases could swamp the circuit courts.[61]

The Study Committee's proposal also errs by providing that the Supreme Court should be given the authority to determine which cases involve true conflicts.[62] It said that this "active participation in the experiment will make it possible to find out whether there are many or only a few conflicts that are both unsuitable for Supreme Court review and nonetheless deserve national resolution."[63] The Study Committee believed the Supreme Court is uniquely suited to this task.[64] Such a perspective fails to consider whether the Supreme Court has the time to consider whether cases of conflict are worthy of resolution. Given the Supreme Court's already overburdened position, the addition of this

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55. *Id.* at 7.
56. *Id.* at 125.
57. *Id.* at 126.
58. *Id.*
59. *See infra* Part IV(C).
60. *See infra* notes 123-124.
61. *See infra* Part IV(B)(1).
62. Study Committee, *supra* note 3, at 127.
63. *Id.*
64. *Id.*

new responsibility is unwarranted. It would require that the Court not only determine whether a conflict exists, but whether the conflict is serious. In so doing, the Court must find that the conflict is serious enough to merit consideration by an en banc court, but not so serious as to merit consideration by the Supreme Court itself. In so adding to the Court's work, this recommendation fails one of the significant tests by which any proposal must be gauged — it must not increase, but should decrease, the Court's workload.

The proposal also causes one other problem. Because it relies on en banc courts to decide cases, large panels will decide the conflict cases.[65] Such large panels can prove unwieldy, with fragmented plurality opinions and disparate dissents. Such a result is likely when important issues are at stake, as in many conflicts. This consequence would leave the national law even more confused than it would be were each circuit to have clear precedent which conflicts with precedent of another circuit.

Thus, the Study Committee's proposal fails on all counts. It will increase the burden on both the Supreme Court and the circuit courts, and it may not be capable of establishing guiding precedent. As a consequence, the proposal should be rejected.

III. Other Proposals

A. . . . Don't Fix It

Two judges on the courts of appeals have protested the formation of any intercircuit panel[66] by writing articles against such an intercircuit panel.[67] Judge Ruth Bader Ginsburg of the District of Columbia Court of Appeals believes that such a court is unnecessary because Congress, not the courts, is to blame for the disarray in federal law throughout the country.[68] Congress, she believes, has caused intercircuit conflicts by drafting vague laws and by leaving the tough questions to judges.[69]

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65. The Study Committee does suggest that en banc panels should be made smaller, but even were they to consist of eleven judges, like the Ninth Circuit en banc hearings, they would still be quite large. *See* Study Committee, *supra* note 3, at 115.

66. Ginsburg & Huben, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417 (1987); Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehille?*, 71 Calif. L. Rev. 913 (1983).

67. Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 Harv. L. Rev. 307, 315 (1983). "[L]ittle evidence suggests that intercircuit conflicts compose a particularly neglected portion of the docket" of the Supreme Court. *Id.*

68. Ginsburg & Huben, *supra* note 66, at 1420.

69. *Id.* As one commentatary has stated, "[C]ongress often leaves the task of interpretation to the judiciary when it is unable to develop a consensus on the details of an issue." Baker & McFarland, *supra* note 1, at 1413.

Moreover, even if Congress had not created such problems, she believes that the benefits of intercircuit conflicts outweigh any detriment caused by them. The benefit, she perceives, is caused by allowing conflicts to "percolate."[70] "Percolation" is explained as allowing conflicts to persist throughout the country so that the best solution to a problem can be found through trial and error.[71] This idea is identical to that of Judge Wallace of the Ninth Circuit Court of Appeals, who also thinks that percolation is a valuable effect of conflicts — allowing the observation of differing practices of the law.[72] He observes that "the very diversity of our vast country, with its many regional differences and local needs, *logically* supports a flexible system that can benefit, when appropriate, from federal law which takes account of these regional variations (e.g., in fields such as water rights)."[73]

These two judges' perceptions of the benefits of percolation are indefensible when carefully weighed.[74] First, their perception of the benefits of percolation would only be accurate if Congress or the Supreme Court sent observers out to the circuits to see how the circuits' differing interpretations of federal law affect the differing circuits' citizenry.[75] Needless to say, such fact gathering is not done by the Supreme Court,[76] and nothing suggests that Congress does such either.[77]

Secondly, these two judges completely ignore the fact that Congress, when it implements federal law, expects its laws to be carried out uniformly.[78] If Congress wanted its laws to be carried out in different ways — according to local or regional differences — it could adopt language in its statutes to so guide judges.[79] To argue that percolation is good with respect to a specific federal law is to argue that federal law should itself not exist as a uniform law of the land.[80] In fact, it

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70. *Id.* at 1424. *See* Note, *supra* note 67, at 317.

71. Ginsburg & Huben, *supra* note 66, at 1424.

72. Wallace, *supra* note 66, at 929.

73. *Id.* at 930 (emphasis added).

74. Justice Stevens also has said that the number of conflicts is exaggerated, and has noted the value of percolation. *See* Stevens, *supra* note 17, at 183.

75. Kurland & Hutchinson, *supra* note 10, at 639.

76. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 454 (1983). "The notion of the Supreme Court's monitoring the results of experiments in more than 100 conflicting interpretations each year strains credulity." *Id.*

77. Kurland & Hutchinson, *supra* note 10, at 639.

78. Thompson, *supra* note 2, at 458.

79. Congress could pass statutes which rely upon local, state, or regional distinctions. It could use non-federal laws as keys to federal law.

80. R. Posner, The Federal Courts: Crisis and Reform (1985). Posner argues that there "is a presumption that it [a conflict] should be allowed to simmer for a time at the circuit level." *Id.* at 163. The reason for the presumption is unknown and unclear, and I think nonexistent.

argues for state or local laws. This belief, although arguably correct in specific instances, allows judges to arbitrarily shape the law to their particular circuit. Many believe that Congress makes too many national laws. However, the citizenry — through their elected representatives — should make that decision.[81] Judges should not assume that they have the ability to correct Congress's failure to account for regional differences by shaping the law to fit their perception of what the law should be. In so trying to correct congressional errors, they destroy the most elementary principle of *federal* law, coherency.[82] Such a role for federal courts directly counters the very reason for their creation.[83] Indeed, it is a claim for states' rights.[84]

Thirdly, Wallace's argument overemphasizes and underemphasizes regional and local differences. As a member of the circuit with the largest number of members and covering the most varied terrain, he should realize that San Francisco has more in common with Houston than it does with Spokane.[85] Yet, he does not think that he and members of the Ninth Circuit would be justified in ignoring decisions of other panels in his circuit if they found that local or regional differences justified this treatment. A system of percolation in the Ninth Circuit would actually be better than national percolation because judges like himself could keep a close watch on the results, thus saving the Supreme Court or Congress from such a task. In so doing, they could provide a valuable service to the courts and to Congress. However, the judges in the Ninth Circuit would not be pleased if panels began adapting laws to fit particular parts of the circuit and explicitly relied upon such differences. Yet, this is the essence of Wallace's and Ginsburg's argument.

Fourthly, the judges are unconcerned by inconsistencies in federal law that promote forum shopping. One commentator thinks that inconsistencies between circuits are one of the significant reasons for forum shopping.[86] Judge Wallace attempts to justify inconsistent results between circuits by noting that real persons are not those usually subject to forum shopping problems; instead, the burdens of the system are borne by big business. Thus, these conflicts are merely the cost of doing

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81. Even though we have also chosen circuits, Congress has never given them the right to decide cases due to the particular differences within the circuit.

82. *See* Strauss, *supra* note 23, at 1092.

83. THE FEDERALIST No. 80 (A. Hamilton).

84. See generally POSNER, *supra* note 80, chapter 6, where he discusses the relationship between the federal and state system in America.

85. Shaefer, *supra* note 76, at 454.

86. Marcus, *Conflicts Among the Circuits and Transfer Within the Federal Judicial System*, 93 YALE L.J. 677 (1985). He said that these inconsistencies provide a "significant incentive" for forum shopping. *Id.* Over 2,000 cases a year are transferred between circuits. *Id.* at 678. *See also* Thompson, *supra* note 2, at 469.

business.[87] This perception reveals Wallace's failure to see that the costs of doing business are ultimately paid for by citizens.

Judge Ginsburg's and Judge Wallace's arguments for percolation also fail to present any evidence in support of percolation. Neither of them cites a single instance in which percolation was valuable in helping Congress or the Supreme Court to rectify the law in light of the best practice. Indeed, differing interpretations of federal law produce conflicting precedents, none of which is practically better than any of the others, but all create problems with the conflict they present.[88] Indeed, a well-articulated basis for percolation does not exist. Therefore, the rising number of intercircuit inconsistencies indicates that something is broken.

B. Fix It

Various scholars and practitioners of the law have been on the other side of this debate. Their views and their proposed solutions merit serious consideration.

1. First in Time, First in Right.—One practitioner who opposes Judges Ginsburg and Wallace's proposal is Walter Schaefer. He has proposed perhaps the clearest solution to the problem of intercircuit conflicts.[89] He advocates that the circuits merely follow decisions of other circuits.[90]

Shaefer's argument is one of the most logical of those proposed. He notes that "[t]here is no element of sovereignty in a federal judicial circuit."[91] As a result, he believes that the courts in each circuit do not have a right to ignore the rulings of other circuits. He believes that their failure to act consistently "ignores the impact of the law on real people."[92] In addition, he notes that judges themselves have resolved to ensure uniformity in their own circuits, and could mandate the same among circuits.[93] Just as no federal law mandates that one circuit panel follow the rulings of another panel in that circuit, so too, nothing mandates intercircuit harmony. Just as judges have opted for intra-circuit harmony, they can also opt for intercircuit harmony. Shaefer believes that the best rule would require circuits to follow the decision of the

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87. Wallace, *supra* note 66, at 931.

88. *See* POSNER, *supra* note 80, at 236. He states, when criticizing too many dissents, that "[t]he case may involve one of those *frequent* questions where it is more important that the law be settled than that it be got just right." *Id.* (emphasis added).

89. Shaefer, *supra* note 76, at 452.

90. *Id.* at 455.

91. *Id.* at 454.

92. *Id.*

93. *Id.* at 455.

first court to rule on an issue unless that decision is overridden by an en banc panel in the second circuit which considers the matter.[94]

The obvious strength of this position is its simplicity. The court first to rule on an issue binds all future panels unless its decision is modified by an en banc panel. As a result, all conflicts are resolved by following the decision of the first court to decide an issue. However, several problems challenge this simple solution.

The foremost problem with Schaefer's proposal is its implementation. Even if the circuits were to adopt such a rule, several difficulties would arise. The circuits would need to agree on whether the first panel to hear the case or the first to publish its opinion has priority. If the former were adopted, a panel might be forced, months after its decision, to withdraw its decision and to realign the rights of the various parties in light of an earlier heard, later disposed-of case, or to delay its decision in anticipation of an earlier argued case. If the latter were adopted, panels might rush to publish knowing that their colleagues in another circuit were resolving the same issue. This could result in poor opinions being rushed to the presses. This problem could be resolved partially by a central processing center that informs the panels when a case with similar issues has been argued. Thus, panels could withhold their opinions awaiting an earlier argued case's resolution. This solution would probably create as many problems as it solves; among which is the failure of the processing center to see potential conflicts, thereby causing conflicts and the problems noted above.

The size of federal courts today is likely to lead to another problem: countless distinctions and a fracturing of federal law. Judges throughout the country, finding themselves bound by the opinion of two judges in another circuit, might be willing to distinguish their case from the earlier one on weak grounds.[95] This distinguishment would itself fracture federal law, leading to the type of balkanization that the rule of first in time was meant to prevent.[96] Furthermore, once such subtle distinctions have crept into the law, circuits themselves could find the need to hold more en banc reviews to resolve intra-circuit conflicts, thus wasting precious judicial time.

2. Let the Conflicting Circuits Resolve the Conflict.—One other commentator has noted that the Supreme Court is overworked and has structured a proposal to reduce its workload. He believes that the Court

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94. *Id.*

95. *See infra* Part IV(C).

96. *See infra* Part IV. I will show that such a problem already exists in the federal courts today.

could reduce its workload if it were able to choose its docket completely.[97] Coleman suggests that

> [w]henever a circuit renders a decision that is in conflict with a prior decision of another circuit, the losing party should be allowed to petition the court issuing the conflicting opinion for a rehearing before a panel of seven judges, three from each of the two circuits which gave rise to the conflict, and a seventh to be assigned from another circuit by the Chief Justice.[98]

Coleman believes that this situation has six advantages over the current system, among which are: efficiency, because "the issue has already been briefed and argued before three of the judges conducting the rehearing"; fraternity, because "it does not elevate a group of circuit judges to a special panel to sit in judgment on their peers," and; confidence, because "it does not create the public impression of a 'supercourt' . . . that would undermine public respect for the circuit courts."[99]

These apparent virtues pale beside the problems that Coleman's proposal presents. First, Coleman presents no mechanism by which to determine whether a conflict has arisen. Apparently, a conflict would only arise when a panel of judges decided that it wanted to resolve an issue differently than a panel had in another circuit and articulated its view that a conflict existed. This could prevent judges on the second court, if they thought they might get an adverse seventh judge on an intercircuit panel, from stating that a conflict existed, thus causing the same fracturing as caused by Schaefer's proposal. If, in the alternative, the entire circuit had to vote on whether an intercircuit conflict had arisen, the vote could often progress upon the judges' opinions on whether they thought the panel had made a poor decision, and whether the decision would be rectified by the special en banc panel. This could lead in turn to another problem. The second panel, which was accused of creating the conflict, would have incentive to distinguish its case on the most insignificant facts, thereby contributing to the number of "almost conflicts" in the courts. This would be of even greater disservice to the citizenry than clear conflicts among the circuits because such conflicts at least provide a degree of certainty within a particular circuit.

Second, Coleman seems to believe that an intermediate circuit would "undermine public respect for the circuit courts."[100] I fail to see how

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97. Coleman, *The Supreme Court of the United States: Managing its Caseload to Achieve its Constitutional Purposes*, 52 FORDHAM L. REV. 1, 16-17 (1983).

98. *Id.* at 18.

99. *Id.* at 19.

100. *Id.*

an intermediate circuit court would necessarily undermine public respect. Even if it did, I fail to see what harm would result to the judiciary if such a decrease were accompanied by a greater respect for judges and the law in general, because of the law's consistency. No evidence suggests that the public would lose respect for the circuits because of a new intermediate court. Instead, the formation of an intermediate court could lead those who deal with the courts to realize that circuit judges are part of a web of persons charged with interpreting the law consistently. Circuit judges may be reluctant to accept a court with the ability and time to oversee their decisions, but their feelings in this matter should give way to the values of consistency in federal law. Such consistency would increase the citizenry's respect for the law in general, and would thereby lead to a greater respect for circuit judges even though their decisions would no longer be practically unreviewable except in less than one percent of the cases.[101]

Finally, Coleman asserts that his system would encourage judges to show "a greater respect . . . for the precedents of other circuits."[102] Yet, he fails to recognize that courts could now decide to follow the precedent of other circuits without the need for any legislation or a new court. Despite the courts' failure to follow decisions in other circuits, he believes that the courts themselves can be used to create consistency. The courts' failure to do so is due not only to an unwillingness to follow the will of their brethren, but also to an inability to do so even if they were willing. The very size of the courts and the number of cases they hear quite naturally result in inconsistencies that can only be resolved by a court whose purpose is to deal with inconsistencies and that has the power to oversee the circuits by ensuring that conflicts are resolved.[103]

3. A National Court.—Among various proposals regarding an intermediate court is one that proposes a National Court with judges drawn at random from various circuits.[104] This proposal has several unique features, some of which are strengths and some of which make the court unworkable.

This proposal allows judges drawn for the court to decide whether they have jurisdiction over a case.[105] Cases could come to this court on appeal from district courts when a party has petitioned it, claiming that the decision in the petitioner's case conflicts with published rulings by

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101. STUDY COMMITTEE, *supra* note 3, at 111.
102. Coleman, *supra* note 97, at 19.
103. *See infra* Part III(B).
104. Thompson, *supra* note 2, at 495.
105. *Id.* at 494.

two other circuits.[106] In addition, cases could come to this court by certiorari from any circuit court decision that conflicted with one of the new court's prior rulings.[107]

The advantage of this proposal is that it would not additionally burden the Supreme Court with having to screen cases for another court. In addition, this court would relieve some of the current pressure on the Supreme Court by hearing some of the cases now heard by the Supreme Court.

However, Thompson's proposal is still not adequate to the task at hand. First, although his panel of seven judges is arguably small enough to prevent numerous concurring opinions, it could still meet with a large number of concurrences. Any number larger than three makes possible more fractured opinions than is necessary.[108] There is no magic attached to the numbers five, seven, nine, etc. Not a single argument has been made showing that such numbers will help a new court deal with its workload. Indeed, a court composed of three judges — the smallest number possible which allows majorities and dissents — could do the job effectively. This is the same number of judges originally allowed in the circuits. A three judge panel, thus, seems ideal.

The second problem with this proposal is an administrative one. Because seven judges would be drawn randomly from the circuits and would sit on the panel for a regulated number of years, no convenient sitting place would exist for the judges. Judges of this court could not be expected to uproot themselves and their families to live in some central location for three (or less) years.[109] Therefore, the judges themselves would be required to travel somewhere distant at regular intervals to hear cases. This would place a strain on judges, decreasing their ability to hear and decide cases.[110]

The third problem is that the restricted ability of this court to hear conflicts allows percolation, with no certain end in sight. Only a decision by two circuits and one district judge would normally allow the National Court to hear a case. However, no reason exists to allow divergent interpretations of federal law to exist until three different circuits decide an issue. Two circuits may have an important conflict, yet the National Court could not hear it.

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106. *Id.*

107. *Id.*

108. R. POSNER, ECONOMIC ANALYSIS OF LAW 512 (3d ed. 1986) [hereinafter ECONOMIC ANALYSIS OF LAW]. Posner notes that the more parties one has to a transaction the more complicated it becomes in an exponential fashion. *Id.*

109. *Id.* at 499.

110. In addition, this court faces many other problems. *See* Alsup & Salisbury, *supra* note 48, at 367-68. These comments apply equally to Thompson's proposal.

Thompson's proposal, like the raft of other proposals, implicitly accepts the value of percolation and is wary of treading on circuit court judges' prerogatives. However, these authors fail to understand that a court which could provide clear and swift review of conflicts — within and among circuits — would aid the citizenry and the courts. Clear laws would make for fewer appeals, thereby saving citizens from needless litigation and allowing courts to spend more time considering other cases.

4. Agency Acquiescence.—A large proportion of federal law subject to review by the circuits involves the actions of administrative agencies. Currently, the Supreme Court allows these agencies to take inconsistent positions in different circuits.[111] As a result, agencies can press panels in one circuit to interpret the law in ways differently than it is interpreted by other circuits.[112]

What is freely given could be freely denied. The Supreme Court could, if it chose to, require agencies to adopt the ruling of the first circuit to rule on a matter. Although the rule only cuts against agencies and not those in disagreement with them, it could eliminate some of the conflicts in the circuits. This is especially true for those issues that are of little impact.

However, if a court's ruling is of little impact, it would seem that the agency would shepherd its resources and would not seek a different ruling in another circuit. In those instances, though, where the rule had a significant impact, the agency would seek to distinguish cases between circuits. If the issue did appear to be important, the courts would be more willing to perceive such a distinction.

Although this rule would have some impact, it would be hobbled by the same factors that would limit the effectiveness of Schaefer's program.

5. Other Proposals for Intercircuit Panels.—Among the various proposals for some type of intermediate appellate court has been that of Justice Stevens, who has suggested the creation of a court that would screen all certiorari petitions and select the docket of the Supreme Court.[113] This court was meant to be identical to the court proposed by the Freund Commission except for Steven's view that its selection of cases for the Supreme Court would be mandatory.[114] Thus, it has that proposal's strengths and weaknesses.[115]

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111. *See* United States v. Mendoza, 464 U.S. 154, 155 (1985).

112. Note, *Administrative Agency Intracircuit Non Acquiescence*, 85 COLUM. L. REV. 582 (1985). This right could be taken away at some point. *See* Owens, *supra* note 49, at 598.

113. Stevens, *supra* note 17, at 177.

114. *Id.* at 182.

115. *See supra* notes 12-28 and accompanying text.

Former Chief Justice Burger also proposed an interim court that would be authorized to decide all cases of intercircuit conflict.[116] This proposal is similar to the one recently introduced by Senator Thurmond.[117]

In his proposal, Burger calls for a temporary court attached to the United States Court of Appeals to the Federal Circuit.[118] This court would be authorized to decide cases involving intercircuit conflicts and possibly would decide cases involving statutory interpretation.[119]

Senator Thurmond has introduced a bill along similar lines.[120] This bill calls for an intercircuit panel composed of nine judges and four alternates who are to be designated by the Supreme Court.[121] This bill would amend Section 4(a)(1) of Chapter 81 of Title 28 U.S.C. so that "[t]he Supreme Court may refer a case in which it has found to exist a conflict with the determinations of another circuit of the United States Courts of Appeals to the Intercircuit Panel."[122] The Supreme Court could review the decisions of this intercircuit panel.[123]

These two proposals, which provide jurisdiction via the Supreme Court, would not solve one of the critical problems to which they were addressed — a decrease in the Supreme Court's workload. The reason that they would not is that the Supreme Court still would be forced to decide which cases were to be heard by this panel.[124] In addition, this court is even larger than that proposed by the Hruska and Freund commissions and would therefore pose the same problem of splintered opinions.

6. Conclusion.—A variety of arguments and counter arguments have been made regarding the need for and the efficiency of various types of intercircuit panels. The shortcomings of the various proposals essentially have been twofold. First, some of the proposed courts would actually burden the Supreme Court by requiring it to sift through cases for the new court. (Freund, Hruska, Study Committee, Thompson, Burger, and Thurmond proposals). Second, all of the courts are to be composed of such a large number of judges that splintered opinions would be likely.

Furthermore, various proposals have shortcomings, including temporary judges (Freund and Thompson) and administrative organization

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116. Burger, *supra* note 17, at 442.
117. For a full critique of this court, see POSNER, *supra* note 80, at 162-66.
118. Burger, *supra* note 17, at 442.
119. *Id.*
120. *See supra* note 4.
121. *Id.* at 2-3.
122. *Id.* at 5-6.
123. *Id.* at 7.
124. *See* Stevens, *supra* note 17, at 179.

(Shaefer, Coleman, and Thompson), making them less than ideal. In addition, the various proposals have failed to address Wallace's and Ginsburg's arguments.

In the Section which follows, I show that the need for the repair work originally proposed by the Freund and Hruska commissions has grown to new dimensions because the circuits have been unable to maintain reasoned uniformity of the law within each circuit. Thus, I add a new and even more potent argument to the arsenal of those calling for the creation of a new circuit.

In addition, I ultimately propose a court that is administratively simple, that will be capable of handling its potential workload, and that is likely to produce clear rules of law. First, however, I reassess whether en banc courts and the current court structure adequately handle conflicting interpretations of federal law.

IV. The Current En Banc Situation

A. Introduction

In 1988, 117 cases were placed before en banc panels in the various circuits. In 1969, only thirty-eight such cases had been similarly placed.[125] The number of en banc cases heard by the circuits has not increased with the same degree of rapidity as have filings with the court of appeals. Nevertheless, the number of cases heard by en banc panels has nearly tripled in the past twenty years while the number of filings with the courts of appeals has quadrupled.[126] This tripling of en banc hearings

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125. The number of cases heard en banc has increased steadily, despite a few temporary drops, since 1968. In fact, the number of en banc hearings increased 236% between 1968 and 1988. The number of total cases heard increased 412% for the same period. These statistics are cited from the 1968 and 1988 Director's Annual Report.

126. *See* Director's Report 195 (1979). The filings numbered 9,116, and the en banc hearings numbered 39 in 1968. In 1988, the filings were 37,524 and the en bancs numbered 92. Director's Report 2 (1988). One would have expected en banc hearings to increase at least as dramatically as filings because the number of cases filed and the increased number of judges, increasing from 97 to 156, would accelerate the chances for conflict. This result has been avoided by three factors: the increase in non-published dispositions which thereby cannot cause a conflict; the ability of judges themselves to vote for en banc hearings, thus allowing judges to limit en banc hearings, but not to limit filings; and the judges' creation of "almost conflicts" which has been noted above. Indeed, one commentator has said,

> there remains a strong presumption against exercise of the en banc power. Judges view en banc hearings as divisive and seek to avoid the friction engendered by a procedure designed to resolve intracircuit conflicts. En banc sittings are costly as well, requiring the attention of each active judge in the circuit.

Note, *Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 Va. L. Rev. 1505, 1508 (1984).

in less than twenty years reveals that conflicts within circuits have at least tripled in twenty years. Indeed, this Section shows that this increased number of en banc hearings would need to be even greater if circuits were to resolve all of their intra-circuit conflicts. The inability or unwillingness of each circuit to maintain uniformity in interpreting federal law is thus another reason to create an intermediate court of appeals. Current procedures for reviewing cases and maintaining uniformity within the circuits are unable to actually maintain intra-circuit harmony.

It was not until 1947 that Congress codified the law providing for en banc courts.[127] This enactment arose as a result of the Supreme Court's decision in *Textile Mills Securities Corp. v. Commissioner*.[128]

In that case, the Supreme Court was faced with interpreting a section of the United States Code which provided that "[t]here shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record with appellate jurisdiction."[129] Two circuits had interpreted the code section differently. The Third Circuit had held that the court of appeals could sit en banc, with more than three judges deciding a case.[130] The Ninth Circuit held that the court of appeals could not sit in a number larger than three.[131] The Supreme Court analyzed the various statutes affecting the work of the circuit courts and concluded that the courts could sit en banc with more than three judges.[132] The Court noted that the benefits of en banc review were threefold: 1) more effective judicial administration, 2) conflicts within a circuit will be avoided, and 3) finality of decision in the circuit courts of appeal will be promoted.[133] It concluded that en banc hearings were allowed by statute. Today, circuits use en banc panels to maintain intra-circuit uniformity in applying a law.

Two rules have been developed to guide judges in voting for en banc hearing by their court.[134] A circuit "may" vote to hear a case en banc "when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."[135] Although this language suggests that an en banc panel should be convened only to resolve conflicts

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127. 28 U.S.C. § 46(c) (1968).

128. 314 U.S. 326 (1941). *See* H.R. REP. No. 306, 80th Cong., 1st Sess. A6 (1947).

129. 28 U.S.C. § 212 (1968) (repealed 1982).

130. Commissioner v. Textile Mills Sec. Corp., 117 F.2d 62, 67-71 (3d Cir. 1940) (en banc).

131. Lang's Estate v. Commissioner, 97 F.2d 867, 869 (9th Cir. 1938).

132. *Textile Mills*, 314 U.S. 326, 329-35.

133. *Id.* at 335.

134. FED. R. APP. P. 35.

135. *Id.*

within a circuit, at least one circuit has decided that intercircuit conflicts also are governed by this rule.[136] Nevertheless, not a single reported case appears to have been taken en banc for the sake of intercircuit harmony.[137] This absence indicates that the circuits themselves will not resolve intercircuit conflicts.

The need for an intercircuit court, as a court capable of resolving conflicts in interpretations of federal law, is highlighted by the circuits' inability to resolve these conflicts themselves. Another compelling reason for such a court is the inability of each circuit to resolve intra-circuit conflicts by means of en banc review. This argument has not been made before. Yet, its validity will be shown by considering the limits of en banc review.

B. Intra-Circuit Conflicts

1. Procedure for En Banc Review.—Whenever discussion of conflicts among or within circuits begins, an advocate will attempt to distinguish the cases, thereby eliminating the conflict.[138] However, these distinctions generally are not based upon a real difference. In fact, such arguments could be used to eliminate the precedential value of any decision by confining it to its unique facts. These distinctions without a difference cost the courts and society.

They cost society because citizens within a circuit do not have a clear body of law to guide their actions. The law, as interpreted, does not give those subject to its power the rules by which to shape their actions. They cost the courts because the ambiguities result in more cases taken to court and more appeals taken to the courts of appeals. Therefore, both society and the courts would benefit from clear circuit precedent.

Each circuit has its own rules for preventing intra-circuit conflicts.[139] Generally, not only can counsel request rehearing en banc upon a belief

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136. Ninth Circuit Rule 35-1 states:

> When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflicts is an appropriate ground for suggesting a rehearing *en banc.*

9TH CIR. R. 35-1, *reprinted in* U.S.C.S. Court Rules (Law. Co-op. 1983 & Supp. 1989).

137. Although I cannot conclusively state that no such cases exist, a broad search through the online computer services revealed no cases among the *en banc* decisions which were based solely upon an intercircuit conflict.

138. *See* Feeney, *Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court*, 67 F.R.D. 301, 305-06 (1975).

139. All of these rules can be found in U.S.C.S. Court Rules (Law. Co-op. 1983 & Supp. 1989). Each of the circuits has developed its own rules, including whether they call it "en banc" or "in bank" or even a combination of the two. The First (Rule 35),

that an intra-circuit conflict exists, but judges within the circuit can suggest a hearing by the full court.[140]

Requests for en banc review can meet with a variety of responses.[141] First, the panel that has written the case can respond by modifying the opinion. In so doing, the panel may reverse itself or, more commonly, note a distinction revealing why its decision differs from the case with which it allegedly conflicts. Second, the panel can reject the petition without modification. Third, the conflict may be clear, and the panel may find itself bound by conflicting precedents; thus, it may request a vote for calling an en banc panel to decide the issue. If the vote is against the formation of such a panel, the original panel will then have to decide which of the conflicting precedents it will follow. Finally, an active sitting judge may request a vote for an en banc review. Again, the court may reject this suggestion, and the panel will proceed as in the previous situation.

Yet, even when requests are made for en banc consideration, judges in the circuit do not necessarily vote to hear the case en banc. Federal Rule of Appellate Procedure 35(a) outlines the requirements for a circuit to hear a case en banc. The rule states: "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc."[142] This rule essentially requires a majority of the active judges to vote in favor of hearing a case en banc before the court will hear it.[143] The rule then outlines when such a vote is appropriate: "Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."[144]

The problem with this rule is that it requires the various circuits to police themselves. Because "less than 1/2 of 1% of their decisions"[145]

Fifth (Rule 35), Sixth (Rule 14), Eighth (Rule 16), and Tenth (Rule 35) Circuits all call it "en banc." The Third (Rule 22), Fourth (Rule 35), and Seventh (Rule 16) Circuits call it "in banc." The Fifth (Rule 14 and 35), Ninth (Rule 35-1 and index), and the Second (27(i) and index) Circuits seem to be confused as to what to call it; the Ninth Circuit shows the most confusion by calling the term "en banc" and "in banc." *See also* 28 U.S.C. § 46 (1988).

140. *See* Thompson, *supra* note 2, at 461. The Eighth Circuit Rule 16 is typical of such allowance.

141. *See* Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 MICH. L. REV. 1637, 1642-43 (1974).

142. FED. R. APP. P. 35(a).

143. This rule has been subject to varying interpretations in the circuits.

144. FED. R. APP. P. 35(a).

145. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D.L. REV. 371 (1988).

are reviewed by the Supreme Court, conflicts may stand unresolved if a majority of the judges are unwilling to decide an apparent conflict.

A variety of factors encourage the courts of appeals to allow intra-circuit conflicts to persist. The single most important factor is time. When an en banc panel is scheduled, all of the sitting judges are subject to being called to hear the case.[146] Reviewing the materials, traveling to the site of the hearing, participating in conference, and writing or concurring in an opinion all require some amount of a judge's time. At the very least, hearing a case en banc requires one full day of a judge's time.[147] In most instances, a good deal more time is required. This time is voluntarily spent insofar as the judges can decrease the likelihood of their being forced to spend this time hearing an en banc case by voting against the granting of an en banc hearing. Even the most conscientious circuit judge, already overtaxed by court matters, is less willing to hear a case to resolve a conflict than would a judge on a court whose very purpose is to resolve such conflicts.[148] As one commentator has stated, "[H]earings en banc are cumbersome and time consuming events and become impractical as the courts grow larger."[149]

Judges do not ignore the guidelines of Rule 35, but bleed its guidelines into each other. They do so because they are willing to overlook apparent conflicts on minor issues. They are willing to allow such cases to be distinguished on the most minor facts.[150] However, if the case is one of significant importance, or one which they believe is significant to society, they are more willing to seize upon the conflict and take that case en banc.[151] Thus, uniformity in the circuit is best maintained on those issues that the circuit judges consider most important.

So far, the analysis of this phenomena has been based upon an examination of the factors judges may weigh in their decision to vote either for or against en banc hearings. Judges act differently than has been asserted herein, and could in fact choose to resolve conflicts despite the incentives to leave conflicts unreconciled. However, judges' writings and case analyses provide evidence to support this analysis. The judges have marked the Federal Reporters with testimony that a conflict exists in a circuit, yet the circuit has refused to resolve it.

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146. In most circuits all the judges will hear the case. In the Ninth Circuit, a limited number of the judges are required to hear the case. Other circuits also have adopted this rule.

147. The judges must travel to the site of the argument, listen to counsel, decide the case in conference, and return home.

148. *See* Note, *supra* note 141, at 1644-45. Many other problems with en banc proceedings are well articulated there.

149. This was part of the reason for the Fifth Circuit split. *Id.*

150. Note, *supra* note 141, at 1647 n.55.

151. *See* Note, *supra* note 126, at 1530; Note, *supra* note 141, at 1639 n.8.

2. The Call for En Banc Consideration.—Judges throughout the circuits have complained about their colleagues' failure to take cases en banc. These complaints are one clear indication that en banc review does not ensure intra-circuit consistency, much less intercircuit consistency.[152]

Recently, Judge Kozinski criticized his colleagues in the Ninth Circuit for such a decision. The case, *Gutierrez v. Municipal Court of Southeast Judicial District*,[153] was a Title VII claim. The court ruled that Title VII prevented the Southeast Judicial District of the Los Angeles Municipal Court from requiring everyone to speak English during work hours when communicating with fellow workers unless "business necessity" could be shown.[154] The court there asserted that an earlier case in the circuit, *Jurado v. Eleven-Fifty Corp.*,[155] had a similar holding.[156] The court so argued even though no analysis of "business necessity" appears in the *Jurado* opinion.

Judge Kozinski noted this attempt to recharacterize an earlier decision and criticized his colleagues for failing to take *Gutierrez* en banc to resolve this conflict with *Jurado*.[157] Kozinski noted that *Jurado* had accepted the Fifth Circuit's analysis in *Garcia v. Gloor*.[158] It held that "if the employee is able to speak English, imposition of an English-only rule does not have a discriminatory impact."[159] Judge Kozinski noted that a finding of business necessity, as the *Gutierrez* panel thought existed in *Jurado*, could not exist in *Jurado* because that case involved an appeal from a grant of summary judgment. Kozinski stated, "I am aware of no case in this circuit, or anywhere else for that matter, affirming a grant of summary judgment in favor of an employer who relied on a business necessity defense."[160] In fact, such a decision is ready made at the summary judgment stage.[161]

Kozinski's dissent from the denial of a rehearing en banc is extraordinary. Judges rarely publicly castigate their colleagues for refusing to take a case en banc. In this instance, Kozinski's analysis, to an

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152. *See also* Note, *supra* note 141, at 1646-47. (Intra-circuit consistency is a secondary rationale for the use of en banc power.).

153. 838 F.2d 1031 (9th Cir. 1988).

154. *Id.* at 1040-41.

155. 813 F.2d 1406 (9th Cir. 1987).

156. *Gutierrez*, 838 F.2d at 1041.

157. Gutierrez v. Municipal Court of S.E. Judicial Dist., 861 F.2d 1187 (9th Cir. 1988) (dissent from order rejecting the suggestion for rehearing *en banc*).

158. 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

159. *Gutierrez*, 861 F.2d at 1190.

160. *Id.*

161. *See, e.g.*, International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989).

unprejudiced eye, seems entirely accurate. His court's failure to take the case en banc can be read in either of two ways. On the one hand, some judges may have agreed with the outcome of *Gutierrez* and did not want to risk changing the result by allowing the case to go en banc. On the other hand, some of the judges may have thought the *Gutierrez* panel had read *Jurado* in a way such that en banc consideration was unnecessary. In either case, it seems unlikely that the judges would have thought that *Jurado* and *Gutierrez* would not confuse those who are focused to abide by their result — the citizens of the Ninth Circuit.

Other circuit judges also have had to deal with the refusal of their colleagues to hear cases en banc. Judge Hill dissented from a refusal to hear a case en banc on the Fifth Circuit.[162] This refusal forced a panel on that circuit to consider which previous case in the circuit should be relied upon as the law of the circuit. In *Georgia Association of Retarded Citizens v. McDaniel*,[163] the Eleventh Circuit explained that "intra-circuit conflicts are by no means novel."[164] In fact, it revealed that "[t]he court has, by necessity, developed rules that govern the choice among conflicting precedents."[165] The rules which govern are: (1) reject the precedent that is inconsistent with either Supreme Court cases or the weight of authority within the circuit; and (2) where no Supreme Court authority exists and no clear weight of authority exists within the circuit, "'we must resort to common sense and reason' to determine the appropriate rule of law."[166] This case involved the awarding of attorney's fees and interest.[167] Although this may not have been a question that the members of the Eleventh Circuit considered of vital importance, their failure to resolve it had left the citizens of the circuit with conflicting precedent for over seven years. Even more important than this case itself, however, is the court's admission that conflicts within the circuit are not novel. Indeed, they are so common that the court had developed rules to guide its resolution of conflicts.

Gutierrez and *McDaniel*, one from the Ninth Circuit and the other from the Eleventh Circuit, respectively, reveal that circuits do allow clear conflicts to persist. Numerous other examples could be cited in which members of a circuit have themselves noted such conflicts.[168] Their

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162. Gates v. Collier, 641 F.2d 403 (5th Cir. 1981).

163. 855 F.2d 794 (11th Cir. 1988). A seven-year hiatus occurred between the creation of the conflict and its resolution in that circuit.

164. *Id.* at 797.

165. *Id.*

166. *Id.* (citations omitted).

167. *Id.* at 798.

168. *See* Legros v. Panther Services Group, Inc., 863 F.2d 345, 352 (5th Cir. 1988) (Jones, J., dissenting); United States v. Troup, 821 F.2d 194, 197 (3d Cir. 1987); Riddle

existence reveals that even within the circuits, conflicts can persist unresolved.

3. Conclusion.—Perhaps the disease is better than the cure. Even when an en banc panel decides an issue, its decision can fail to clarify the law. Special concurrences and dissents can result in such ambiguity in the court's decision that the decision provides guidance no further than resolving the conflict before it. As a result, federal law cannot be truly said to be promulgated.[169] Persons who attempt to comply with the law as decided by the circuit, even if they do so with the best intentions, may act contrary to it. Ambiguity at this stage is worse than a slightly bad law which is capable of being understood. Thus, en banc opinions, because they are composed by a panel of many judges, lend themselves to creating ambiguity.[170] Indeed, since the cases called en banc are usually of special importance, judges are likely to see the case in differing ways, and this ambiguity will infect some of the most important laws. This variety of problems with the current en banc system might legitimate an intermediate court. However, in addition to these problems is a pervasive and ultimately more problematic tendency — "almost conflicts."

C. "Almost Conflicts"

"Almost conflicts" are certain to develop in a system like the circuit courts in which a limited capacity for reviewing cases exists. "Almost conflicts" involve cases that interpret a law or set of laws to avoid conflicts, thus creating distinguishing characteristics of the cases or ad hoc justifications. These cases make the law needlessly fact-specific. As a result, a law or set of laws that Congress has enacted becomes fractured. This situation arises when judges are faced with a case that is similar, but not identical to a previous case decided by a previous panel in the circuit. The new case, judges believe, can be distinguished on some factual basis leading to a different outcome than that mandated by the case with which the new case is almost in conflict.

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v. Secretary of Health & Human Services, 817 F.2d 1238, 1244 (6th Cir. 1987) (Engel, J., dissenting); District Counsel 47, Am. Fed'n v. Bradley, 795 F.2d 310, 316 (3d Cir. 1986) (Aldisert, J., dissenting); Church of Scientology of Cal. v. Foley, 640 F.2d 1335, 1336 (D.C. Cir. 1981) (Spottswood, J., dissenting); Hockenbury v. Sowders, 633 F.2d 443, 445 (6th Cir. 1980) (Keith, J., dissenting); United States v. Williams, 519 F.2d 368, 369-70 (8th Cir. 1975).

169. Two examples in which the en banc decision is difficult to assess are Lowry v. Baltimore & Ohio R.R. Co., 707 F.2d 721 (3d Cir. 1983) (en banc) and Meadows v. Holland, 831 F.2d 493 (4th Cir. 1987) (en banc).

170. *See* Note, *supra* note 141, at 1647, 1650.

The consequence of these types of decisions are twofold. Those subject to the law and its interpretation by the court cannot know where their case stands if it is not squarely on point with a previous case. Thus, they are likely to pursue litigation to defend what may be their right.[171] This costs the citizens a fair amount of time and money.[172] This pursuit of rights leads to another consequence, an increase of cases placed before the judiciary. Courts face an increase in cases because their precedents are seen as fact-specific.[173] In short, "almost conflicts" spawn more litigation, which may in turn fashion more ambiguity.

That "almost conflicts" exist is easily shown. First, the previous Section, which shows that true conflicts are allowed to exist, is persuasive evidence that "almost conflicts" would also be allowed. If judges are willing to let the more egregious problem, clear conflicts, exist, they will also allow the less problematical case, the "almost conflict," to exist. The second proof of such conflicts can be found in the cases themselves.

One need not look far for instances in which a circuit has adapted a federal rule or previous decision of a panel in the circuit to comport with its view of what the law should be. Several examples underscore this situation.

1. Case Examples.—The Ninth Circuit has long advocated that an Administrative Law Judge's (ALJ) findings in social security cases should be upheld if they were based upon substantial evidence in the record.[174] This rule allowed the circuit to show some degree of deference to the ALJ and to keep it from having to reweigh the facts in the record when a party sought review before the Ninth Circuit.

In 1983, a panel of the Ninth Circuit chose to modify this general rule with regard to the pain testimony of a claimant. In *Murray v. Heckler*, Murray contended that the ALJ should be required to make a specific finding on the credibility of his pain testimony, or the ALJ's decision should be overturned.[175] The Ninth Circuit endorsed Murray's position and adopted a rule requiring the ALJ to make specific findings rejecting a claimant's pain testimony.[176] This modification of the general rule requiring deference to an ALJ's decision if based on the record

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171. *See* ECONOMIC ANALYSIS OF LAW, *supra* note 108, at 515.

172. POSNER, *supra* note 80, at 91.

173. *See* STUDY COMMITTEE, *supra* note 3, at 110. The committee noted that in 1945, one of every forty district court determinations was appealed, now the number is one of every eight. *Id.*

174. Murray v. Heckler, 722 F.2d 499, 501 (9th Cir. 1983) (the court there set forth the history of the judge-fashioned rule).

175. *Id.*

176. *Id.* at 502.

was accepted by the court without dissent.[177] Nevertheless, it was a clear reshaping of the law. Under *Murray*, if the ALJ did not make specific findings regarding subjective allegations of pain, the ALJ's decision must be remanded even if substantial evidence supported the ALJ's findings. This, in effect, limits the holding that the ALJ's findings are upheld if they are substantially supported by the record. It creates an exception to the broad rule. Yet, that was not enough for the Ninth Circuit. It seemed to be distressed that an ALJ, on remand, could discredit pain testimony, which discrediting would be subjected to the "substantial evidence" standard on appeal. Therefore, it carved out an even larger exception. In *Varney v. Secretary of Health and Human Services*,[178] it took the step to prevent such discrediting on remand. The court there decided that "where it is clear from the administrative record that the ALJ would be required to award benefits if the claimant's excess pain testimony were credited, we will not remand solely to allow the ALJ to make specific findings regarding that testimony."[179] The court did not want the ALJ to make a factual finding on subjective pain testimony. Instead, the claimant is awarded the appropriate claims even if the weight of contrary testimony overwhelms the claimant's testimony. In a later case, *Varney* was used to further eviscerate the rule of deference to the ALJ. There, a Ninth Circuit panel held that one could provide the claimant a remedy, absent the situation of *Varney*, where "delay experienced by [claimant] has been severe and because of [claimant's] advanced age."[180]

These cases were crafted by a variety of panels so as not to explicitly repudiate the general principle of deference to the ALJ's findings. Yet, they allow any claimant who claims pain to force the ALJ to make specific findings regarding such pain. If the ALJ fails to make such findings, the Ninth Circuit has shown a willingness to shape its decisions so that the claimant may receive an award. Similarly, this line of cases could be developed with regard to a whole host of claims made by claimants before an ALJ. There is nothing peculiar to pain testimony that makes it deserving of this special protection. Indeed, one could see why subjective pain testimony is least deserving of this sort of benefit because of its non-objectivity. This line of cases presents a clear picture of a panel reaching for a decision, and thereby causing "almost conflicts" with prior precedent. Indeed, the court in *Hammock v. Bowen* continued to recite the rule that "[w]e affirm a denial of benefits when the

177. *See* Miller v. Heckler, 770 F.2d 845, 848-49 (9th Cir. 1985); Taylor v. Heckler, 765 F.2d 872, 876 (9th Cir. 1985).

178. 859 F.2d 1396 (9th Cir. 1988).

179. *Id.* at 1401.

180. Hammock v. Bowen, 867 F.2d 1209, 1214 (9th Cir. 1989).

Secretary's decision is supported by substantial evidence and is free from legal error,"[181] while at the same time they eviscerated the rule. The unwary ALJ and the well-crafted complaint can combine to allow someone unworthy of benefits to receive them as a matter of law. In the process, the general rule has been excepted in one significant respect. Further exceptions to the rule could be developed by judges. This exception will encourage litigants to take appeals to the Ninth Circuit, hoping that one of its panels may carve out another exception to fit the appellant's unique situation. This line of cases shows how "almost conflicts" can develop. Indeed, this line of cases cannot be cut back without causing further conflict within the circuit.

The Ninth Circuit also has shown its ability to make distinctions and to cause confusion in areas dealing with constitutional law. The requirement of ripeness for claims alleging substantive and procedural due process and takings has been decided in a number of cases. In *MacDonald, Sommer & Frates v. Yolo County*,[182] the Supreme Court held that regulatory takings claims can only be brought when "a final and authoritative determination of the type and intensity of development legally permitted on the subject property" has been made.[183] Absent such a finding, the court stated that a regulatory taking claim could not be brought.[184] The first Ninth Circuit case dealing with regulatory takings after *Yolo County* failed even to cite it. In *Norco Construction, Inc. v. King County*,[185] the court stated that

> under federal law the general rule is that claims for inverse taking, and for alleged related injuries from denial of equal protection or denial of due process by unreasonable delay or failure to act under mandated time periods, are not matured claims until planning authorities and state review entities make a final determination on the status of the property.[186]

Thus, the court paralleled the holding of *Yolo County*, but failed to use any of its analysis. *Yolo County* and *Norco* were both deficient insofar as they failed to explain what was meant by "final," perhaps the most crucial word in their holdings.

The Ninth Circuit acted quickly to fill that lacuna. In *Kinzli v. City of Santa Cruz*,[187] the court held that to assert a regulatory takings claim,

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181. *Id.* at 1212.
182. 477 U.S. 340 (1986).
183. *Id.* at 348.
184. *Id.*
185. 801 F.2d 1143 (9th Cir. 1986).
186. *Id.* at 1145.
187. 818 F.2d 1449 (9th Cir. 1987).

a claimant must "establish two components: (1) that the regulation has gone so far that it has 'taken' plaintiff's property, and (2) that any compensation tendered is not 'just.'"[188] The first component demands that one have a final decision from the pertinent governmental body. A final decision involves: (1) a rejected development plan; and (2) rejected variances which would permit uses not allowed under the regulations.[189] The court also held that an equal protection claim "is not ripe for consideration by the district court 'until planning authorities and state review entities make a final determination on the status of the property.'"[190] Finally, the court held that substantive due process claims are ripe only when the plaintiffs have "final decisions regarding the application of the regulations to their property and the availability of variances."[191] Therefore, under *Kinzli*, finality is required for claims of takings, equal protection, and substantive due process with regard to regulation of one's property.

Herrington v. Sonoma County,[192] decided six months after *Kinzli*, used its specific facts to create a futility exception to the finality requirements for substantive due process and equal protection claims. The court there stated that the finality requirement of *Kinzli* applies to substantive due process and equal protection.[193] However, the court distinguished *Herrington* from *Kinzli* by stating that even though a completed zoning application had not been made, it was as good as made. Thus, it met the first finality requirement outlined in *Kinzli*. Second, the court held that an application for a variance would have been futile, and was therefore not required.[194] Thus, *Herrington* was the first case which tried to limit the ruling in *Kinzli*.

The Ninth Circuit soon created more confusion in this area. In *Shelter Creek Development Corp. v. City of Oxnard*,[195] the court cited *Lake Nacimiento Ranch v. San Luis Obispo County*[196] for the proposition that "the 'futility exception' is unavailable unless and until landowner has submitted at least one 'meaningful application' for development of the property and one 'meaningful application' for a variance."[197] This limitation on the futility exception was held to apply to takings, sub-

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188. *Id.* at 1453 (citing *Yolo County*, 477 U.S. 340).
189. *Id.* at 1454.
190. *Id.* at 1455.
191. *Id.* at 1456.
192. 834 F.2d 1488 (9th Cir. 1987).
193. *Id.* at 1494.
194. *Id.* at 1496.
195. 838 F.2d 375 (9th Cir. 1988).
196. 830 F.2d 977 (9th Cir. 1987).
197. *Shelter Creek*, 838 F.2d at 379.

stantive due process, and equal protection claims.[198] *Shelter Creek* thus seems to create a conflict in the Ninth Circuit by conflicting with *Herrington*.

Further confusion was added by two later cases. In *Austin v. City and County of Honolulu*,[199] the court found that a takings claim requires finality, for example, a rejected development plan and denial of a variance.[200] This case did not consider whether a futility exception was possible. Thus, this case is squarely on point with *Kinzli* with regard to takings claims.

Continuing to add to the confusion, the court decided *Bateson v. Geisse*.[201] There, the court held that a substantive due process claim is ripe even though the plaintiff did not "seek 'just compensation.'"[202] The court did not even discuss any of the finality criteria established in *Kinzli* and its progeny. It did not explicitly reject *Kinzli*'s criteria; it merely allowed a substantive due process claim when a governing body arbitrarily withheld Bateson's building permit.[203] The court there, unlike the *Herrington* court, did not even try to meet the requirements of finality established in *Kinzli*.

The Ninth Circuit continues to add cases to this confusing morass. Again, these cases possibly could be distinguished on various factual grounds. Yet, they seem to conflict or almost conflict on numerous points. Indeed, they are further evidence that the citizenry and the courts of appeals would be well-served by a court capable of taking such a host of cases and developing consistent logic for the circuits.

2. Conclusion.—Recently, a partner in a California law firm noted one instance of "almost conflicts" in the Ninth Circuit.[204] His survey of one area is not new, nor is it rare. Although the two examples I have drawn came from the Ninth Circuit, their application is not limited.

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198. *Id. Lake Nacimiento* itself is not a clear authority for this proposition because it states, in the space of one paragraph, that "[t]he Ranch correctly argues that it can avoid the ripeness requirement of a final determination if it can show that the submission of a development plan and an application for a variance would be futile." 830 F.2d at 980. It then states, 10 lines later, "[s]ince the Ranch has failed to submit such applications [for development and a variance], it may not argue that it would be futile to secure a final determination from the County." *Id.* at 980-81. Thus, *Lake Nacimiento* seems to cause a conflict within the circuit.

199. 840 F.2d 678 (9th Cir. 1988).

200. *Id.* at 680. This is in accord with Lai v. City and County of Honolulu, 841 F.2d 301, 303 (9th Cir. 1988).

201. 857 F.2d 1300 (9th Cir. 1988).

202. *Id.* at 1303.

203. *Id.*

204. Perry, *9th Circuit Splits Over Summary Judgment*, Los Angeles Daily J., Feb. 23, 1989, at 7, col. 1.

An experienced practitioner in any of the circuits could note specific examples of "almost conflicts." Such cases provide further justification for a new court of appeals.

D. History

A final justification for a new intercircuit court can be drawn from history. Many historical parallels can be drawn between the situation present when the circuit courts were first established and what would prevail were a new intermediate court established.

First, the circuit courts were originally created "to play the basic role of error correction that the Supreme Court could not"[205] with regard to the various district courts. The Circuit Court of Appeals Act of 1891 granted the circuit courts jurisdiction over appeals from district courts in nearly all admiralty, diversity, non-capital criminal, patent, and revenue cases.[206] At that time, the relatively small size of the circuit courts, generally only three judges per circuit, ensured uniformity *within* the circuits, and the relatively fewer circuits and cases heard by them allowed the possibility of uniformity *among* the circuits. The same role could be played by an intermediate court, ensuring uniformity within and among the circuits. Indeed, this historical perspective reveals that the position taken by Judges Wallace and Ginsburg is contrary to the very reason why these two judges are circuit judges.

V. A New National Court

The various proposals advocating a new intermediate court have all failed to recognize that the federal courts are an interconnected system so that any change in one part of that system will have and does have repercussions for the whole system. They have failed to see that the Supreme Court's inability to review conflicts between the circuits not only suggests that the Supreme Court is overworked, but that the circuit courts themselves are stressed. This Article has attempted to show that not only is the Supreme Court incapable of resolving the numerous intra-circuit conflicts that arise every year, thus providing support for a court that could do so; but also that the circuit courts are incapable of ensuring uniformity within themselves, thus providing support for a court that could do so. I believe that an intermediate court of appeals could resolve conflicts among the circuits and within the circuits, thereby

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205. Baker & McFarland, *supra* note 1, at 1405 (citing Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826).

206. *See* Congressional Quarterly, Guide to the United States Supreme Court 265 (1979).

ensuring that federal law is applied fairly, for example, evenly, throughout our federal system.

I propose the creation of a court with the power to resolve conflicts among and within the circuits. This court would have the following features:

i. Parties could appeal to this court directly, instead of being certified via the Supreme Court as some of the aforementioned proposals advocated. A party who thought that the decision of a circuit court resulted in a conflict either within the circuit in which the decision was rendered, or among any of the federal circuits, could first seek rehearing before the panel that first heard its case. If the panel failed to reconcile the conflict, the party could appeal to the intermediate court. The intermediate court could then decide whether a conflict truly existed and was therefore in need of resolution.

ii. This intermediate court should resolve conflicts that a court of appeals creates. If a panel in any of the circuits says in its opinion that it has decided to resolve a federal law in a manner that would create a conflict with another circuit, the intermediate court would be forced to hear that case if either party sought review before it.

iii. Decisions of this court could be appealed to the Supreme Court. However, the Supreme Court could choose not to hear these appeals. This procedure would allow the Supreme Court to decide those cases it deemed wrongly decided, yet allow it to let stand cases it deems unimportant or correctly decided. The Court would not need to take cases merely because a split between the circuits was causing national problems.

iv. The judges of this new court would be nominated by the President and confirmed by the Senate, just as are current courts of appeals judges. They would be article III judges. The court would consist of three judges headquartered in a central geographical location such as Chicago or Denver, yet capable of hearing cases anywhere in the country.

The new intermediate court would ensure that conflicts within and among circuits are not allowed to fester. Not only would the citizenry of this country be aided by this court which would keep the law uniform throughout the country, but the court system also would be aided in several ways. First, the intermediate court could eliminate the time consuming en banc review of cases. This would allow the circuits to concentrate on cases brought before them in the normal course. Second, the court system would be aided by clearer laws. Because the intermediate court could resolve "almost conflicts" within circuits if it believed that a case caused an actual conflict, the circuits would have their interpretation of law more clearly defined so that all panels in a circuit would decide similar cases consistently with one another. This would aid the circuits in applying the law to cases before them, and would lead to a

decrease in the number of appeals because litigants would be able to perceive the rationale in the law of the circuit and would be less willing to spend their money in hope of landing the right panel. The Supreme Court would also be aided insofar as all the cases of conflict that it now decides, and those that it is incapable of deciding, would now be resolved by another tribunal. Thus, the Court could decide cases it thinks are important in their own right, and not merely important because they have created a national conflict.

The number of potential cases such a court should hear may threaten to swamp it. Thus, I suggest that it normally resolve conflicts by adopting the rationale of one of the courts from which the conflict arose. This presumption would allow the court to easily resolve at least 250 cases per year. I believe that this type of review would be sufficient to resolve most of the conflicts that now arise between and within circuits. If this court was incapable of handling all of the conflicts, Congress could create two panels of three judges, splitting the country between them. These two courts would be required to follow the other panel's precedent if the other panel previously decided a case involving the same issue. A central filing office could track potential conflicts between the intermediate courts, and advise the respective panels accordingly.

The court I propose has a host of advantages. First, it allows for resolution of conflicts without requiring the Supreme Court either to resolve them or to determine that another court should. Thus, my proposal lightens the Supreme Court's burden without saddling it with other duties. Second, it provides for swift resolution of numerous conflicts. Third, it establishes a court with clear authority to resolve conflicts. At least one of these three benefits has been lacking in one manner or another in all the other proposals.

VI. Conclusion

The United States Supreme Court and the federal appellate courts are currently incapable of providing a consistent interpretation of federal law. This inconsistency is, in part, a consequence of the vast number of cases faced by courts of appeals and the increasing number of appellate judges.

The consequences of this disarray are several. Litigants may forum shop hoping to find a circuit whose judges have interpreted federal law in a beneficial manner. The judges themselves cannot find clear precedent for their decisions. As a result, even citizens seeking to comply with the law may be incapable of doing so because they cannot discern it from the various ad hoc interpretations of the law. As a result, the law can hardly be considered true law.

An intermediate court of appeals could resolve this situation. A court composed as I have suggested would not only relieve some of the

pressure on the Supreme Court — a benefit that has been sought by two commissions — but would create consistency among and within circuits. As a result, judges on all levels would benefit from clear precedent. Most importantly, however, the citizenry would have clearer, uniform precedent by which they could gauge their actions.

The Proper Scope of Claimant Coverage Under the Indiana Medical Malpractice Act

Introduction

The Indiana Medical Malpractice Act[1] has spawned numerous problems, one of which is the proper scope of claimant coverage. That is, what types of claims, other than those which clearly and unambiguously fall within the Act, should the courts interpret the Act to include? The issue elicits many questions. Can only patients with malpractice claims be required to abide by the Act? Only patients and/or their legal representatives? Must temporarily incompetent persons, made patients by involuntary commitment to a health care facility, abide by the Act when later filing a malpractice claim? What about patients injured by other patients within the confines of a hospital? Are third-party, derivative claims covered under the Act? Do third-party, non-patient claims by those injured as a result of medical treatment of patients fall within the Act?

The third-party context is the primary emphasis of this Note. This area of inquiry lies on the penumbra of the Act's application. However, these questions have arisen and will continue to arise in Indiana, and it is possible, through a careful analysis of the field as it exists today, to resolve them consistently with the language and purposes of the Act. This Note has three main goals. First, it surveys the types of claimants who fall within the Act according to the Indiana courts' existing interpretations. Second, it analyzes these Indiana cases focusing on their consistency with the statutory language, with one another, and with the probable legislative intent underlying the Act. Third, it suggests an approach for future consideration of this set of issues in Indiana.

This Note consists of five main sections in addition to an introduction and a conclusion. Section I provides background on the questions central to the later sections. Section II discusses the legislative intent of the Act. Section III addresses the placement of derivative claims within the Act. Section IV concerns marginal cases involving the definition of "patient" under the Act. Section V develops the extension of the Malpractice Act to cover third-party, non-derivative claims which allege medical malpractice. These five sections combine to demonstrate, from different conceptual angles, this Note's conclusion that all third-party

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1. Ind. Code §§ 16-9.5-1-1 to -10-3 (1988). Throughout this Note these statutes are referred to as "the Act" or the "Medical Malpractice Act."

claims based on malpractice ought to come within the Act, whether these claims are direct or derivative.

I. Background

An apparent ambiguity in the language of the Act is at the heart of nearly all the disputes concerning claimant coverage. Three central provisions create this ambiguity and typically require construction by courts. The first provides that "*no action* against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this chapter and an opinion is rendered by the panel."[2] The second provision defines "malpractice" as any "*tort* or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, *to a patient.*"[3] The third defines "tort" as any "*legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.*"[4]

The first quoted section suggests that the Act extends to any action whatsoever against a qualified health care provider. The second section suggests that only a patient may sue under the Act and that only patients' claims are governed by its provisions. Finally, if the definition of "tort" were substituted in place of the term "tort" into the definition of "malpractice,"[5] the Act would again appear to include claims other than those by patients.

The most recent case addressing a third-party claim, *Midtown Community Mental Health Center v. Estate of Gahl*,[6] provides a focal point

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2. Ind. Code § 16-9.5-9-2 (1988) (emphasis added).

3. Ind. Code § 16-9.5-1-1(h) (1988) (emphasis added).

4. Ind. Code § 16-9.5-1-1(g) (1988) (emphasis added).

These are not, of course, the only three provisions which trouble interpreters of the Act when addressing questions of the scope of claimant coverage. They are, however, central to virtually all disputes over coverage of the Act. Several other provisions are discussed later in this Note in the context of case analysis.

5. If this were done, the definition of "malpractice" would read: "'malpractice' means *a [legal wrong, breach of duty, or negligent or unlawful act or omission* proximately causing injury or damage *to another*] or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, *to a patient.*" (emphasis added). It would therefore include both the possibility of injuries directly to patients, and the possibility of injuries to "another" affected by treatment or omission thereof to a "patient."

6. Midtown Community Mental Health Center v. Estate of Gahl, 540 N.E.2d 1259 (Ind. Ct. App. 1989), *trans. denied.* The claim in *Gahl* is advanced by Thomas E. Gahl's wife, Nancy L. Gahl, as administratrix of his estate and on behalf of Christopher T. Gahl and Nicholas K. Gahl, their children. Throughout this Note, the estate (plaintiff-

for this Note. In *Gahl*, the court held that the estate of probation officer Thomas E. Gahl, who was killed by the hospital's former patient, was not required to bring its claim against the defendants to the medical review panel in conformity with the Act, even though several of the claims were for alleged malpractice in connection with the hospital's treatment of the patient.[7] The court concluded that the Indiana Medical Malpractice Act requires only patients and those with strictly derivative claims to come within the Act.[8]

The remainder of this Section briefly presents and classifies, as a prelude to specific analysis, the previous Indiana cases which turn on questions regarding the scope of claimant coverage under the Act.

In 1980, the First District Court of Appeals held in *Sue Yee Lee v. Lafayette Home Hospital, Inc.*[9] that parents seeking recovery for loss

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appellee) will be referred to as "Gahl," "estate of Gahl," or some similar designation. The defendants are jointly designated as "Midtown" (defendant-appellant). Also joined as defendants were: Health and Hospital Corporation of Marion County, Indiana; Wishard Memorial Hospital; Alan D. Schmetzer, M.D.; Michael J. Trent, PSW; Eugene S. Turrell, M.D.; and the Trustees of Indiana University.

7. Brief for Appellant in Support of Petition to Transfer at 16-17, *Gahl*, 540 N.E.2d 1259 [hereinafter Brief for Appellant]. The claims involved failure to supervise, abdication of duty, incorrect diagnosis, failure to properly medicate, and failure to warn Thomas Gahl of the patient's dangerousness.

Indiana has, since the filing of the claim in *Gahl*, enacted legislation which provides partial immunity from civil liability to third persons for "health care providers" (defined in IND. CODE ANN. § 34-4-12.6-1 (West Supp. 1990)) who either fail to warn or fail to predict dangerous behavior on the part of their patients. IND. CODE ANN. § 34-4-12.4-2 (West Supp. 1990) provides:

> A mental health service provider is immune from civil liability to persons other than the patient for failing to:
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> (1) predict; or
>
> (2) warn or take precautions to protect from;
>
> a patient's violent behavior unless the patient has communicated to the provider of mental health services an actual threat of physical violence or other means of harm against a reasonably identifiable victim or victims, or evidences conduct or makes statements indicating an imminent danger that the patient will use physical violence or use other means to cause serious personal injury or death to others.

This provision does not grant absolute immunity to the health care provider, nor does it limit the element of foreseeability only to those who are individually identifiable. It provides immunity only for failure to warn when the provider has not had adequate warning as to the dangerous propensities of the patient relative to identifiable persons or, more generally, "to others." Thus, even though providing limited immunity, the statute does not render the outcome in future cases like *Gahl* certain.

This provision is also limited in that the immunity provided is confined to failure to warn, and is silent about any other potential medically-based cause of action stemming from treatment of a psychiatric patient.

8. *Gahl*, 540 N.E.2d at 1262.

9. 410 N.E.2d 1319 (Ind. Ct. App. 1980).

of services and medical expenses for their minor child were required to abide by the provisions of the Act. Although the issues in *Sue Yee Lee* are distinct from those in *Gahl* because the claim in *Sue Yee Lee* is clearly derivative, neither case involved a claim brought by the patient himself. The *Gahl* court cited *Sue Yee Lee* as the primary basis for limiting third-party claims to unambiguously derivative ones.[10] The court in *Gahl* read *Sue Yee Lee* as adopting the view that the legislature intended that the "act appl[y] not only to cases where the patient was the plaintiff, but also to cases where a third-party plaintiff's claim was derived from the patient, such as a parent's claim based upon a minor child's injury."[11] However, the *Gahl* court also acknowledged a more sweeping conclusion in *Sue Yee Lee*: that the Act covered all claims "where the *underlying basis for liability* is medical malpractice."[12] This tension inherent in the language of the *Sue Yee Lee* court and acknowledged by the *Gahl* court suggests judicial uncertainty over the proper scope of the Act's coverage of third-party claims.

The *Gahl* court, in order to distinguish *Sue Yee Lee*, stressed that only third-party claims that are derivative of patients' claims come within the provisions of the Act.[13] This distinction may or may not satisfactorily distinguish *Gahl* and *Sue Yee Lee*, but the view that only derivative claims, as in *Sue Yee Lee*, are covered under accepted theories of professional negligence is not universal.[14]

In a different setting, but one in which claimant coverage was again the central issue, the court of appeals concluded in *Winona Memorial Foundation of Indianapolis v. Lomax*[15] that the Malpractice Act was not applicable to a plaintiff who fell and was injured while in the hospital even though the claimant was a patient there at the time of the injury. The court reasoned that the sort of premises liability claim the plaintiff asserted was not within the intended scope of the Act.[16]

However, in *Methodist Hospital v. Rioux,*[17] the same court concluded two years earlier that the Malpractice Act applied to a plaintiff in very

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10. 540 N.E.2d at 1261.

11. *Id.*

12. *Id.* (emphasis added). This conclusion is dicta, but resulted from the *Sue Yee Lee* court's construction of the terms of the Act. *See infra* Section V of this Note.

13. *Id.*

14. *See, e.g.,* Hedlund v. Superior Court of Orange County, 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983); *Gahl*, 540 N.E.2d at 1263 (Hoffman J., dissenting); Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979).

15. 465 N.E.2d 731 (Ind. Ct. App. 1984).

16. *Id.* at 740.

17. 438 N.E.2d 315 (Ind. Ct. App. 1982).

similar "slip and fall" circumstances as those in *Lomax*. In *Rioux*, the court reasoned that the claim was based primarily on a failure of appropriate care in a medical setting and was therefore covered by the Act.[18] The *Lomax* court distinguished its *Rioux* decision by noting the presence in *Lomax* of a clear and unambiguous premises liability claim, which the court concluded took the claim out of the Act.[19]

Several other Indiana cases which involve variations on the general issue at stake in *Gahl* are the focus of later discussion.[20] Some of these cases deal with the practical application of the definition of "patient" under the Indiana Medical Malpractice Act.[21] Others concern the issue of potential duties of health care providers to protect patients or third parties from assault or other injury.[22]

Several years ago commentators noted the tension in this area[23] and the courts' failure to achieve resolution.[24] The recent decision in *Gahl*, and the silence on the particular issues involved in *Lomax* and *Rioux*, suggest the issues remain unresolved in Indiana. A strong dissent by Judge Hoffman in *Gahl*[25] adds to this uncertainty. The dissent relies heavily on interpretations of the Louisiana Medical Malpractice Act,[26] the language of which is almost identical to Indiana's in this area.[27] The Louisiana case of *Thomas v. LeJeune, Inc.*[28] held that "*all* claims against health care providers for malpractice must first go through the Medical Malpractice Act procedure, regardless of whether the claimant is a patient or a non-patient."[29] Judge Hoffman's dissent in *Gahl* likewise

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18. *Id.* at 316-17.

19. 465 N.E.2d at 742.

20. Scruby v. Waugh, 476 N.E.2d 533 (Ind. Ct. App. 1985); Ogle v. St. John's Hickey Memorial Hosp., 473 N.E.2d 1055 (Ind. Ct. App. 1985); Detterline v. Bonaventura, 465 N.E.2d 215 (Ind. Ct. App. 1984); Estate of Mathes v. Ireland, 419 N.E.2d 782 (Ind. Ct. App. 1981).

21. *See, e.g., Scruby*, 476 N.E.2d 533; *Detterline*, 465 N.E.2d 215.

22. *See, e.g., Ogle*, 473 N.E.2d 1055; *Mathes*, 419 N.E.2d 783.

23. Kemper, Selby & Simmons, *Reform Revisited: A Review of the Indiana Medical Malpractice Act Ten Years Later*, 19 IND. L. REV. 1129 (1986).

24. *Id.* at 1139.

25. 540 N.E.2d at 1262-63 (Hoffman, J., dissenting).

26. LA. REV. STAT. ANN. § 40:1299.47 (West Supp. 1990).

27. LA. REV. STAT. ANN. § 40:1299.47(B)(1)(a)(i) (West Supp. 1990) states: "No action against a health care provider . . . may be commenced in any court before the claimant's proposed complaint has been presented to a medical review panel. . . ."

28. 501 So. 2d 1075 (La. Ct. App. 1987). In *LeJeune*, the plaintiff slipped and fell in a tavern. Third-party issue arose out of the tavern owner's claim made against a former health care provider of the plaintiff. The factual setting is, therefore, different in the two cases, but the inclusiveness of the malpractice statute in each case is at issue.

29. *Id.* at 1077 (emphasis in original). Notwithstanding the use made of *LeJeune* by the parties in *Gahl*, several Louisiana cases evince the same tension inherent in Indiana's

stressed the importance of a malpractice claim by Gahl's estate, regardless of the status of Gahl as a patient. Judge Hoffman concluded:

> The Act should cover *all claims* against health care providers whether the claimant is a patient or nonpatient. This is regardless of whether the patient will derive some benefit from the nonpatient claim. The essential element is that the claim is based on alleged medical malpractice as in this case.[30]

This Note suggests that this conclusion is the most appropriate in light of discernable legislative intent, previous case law, and the special role of the medical review panel created by the Act.

II. Legislative Intent and Social Policy of the Act

This Section reviews the established and often-cited analysis of the Indiana Supreme Court in *Johnson v. St. Vincent Hospital, Inc.*[31] regarding the legislative intent and underlying social policies of the Medical Malpractice Act.[32] This Section also analyzes *Gahl*, the focal point case, in light of legislative intent.

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decisions. For example, although Louisiana courts have decided to allow derivative claims to come within the scope of the medical malpractice act, *see* Gobble v. Baton Rouge Hosp., 415 So. 2d 425 (La. Ct. App. 1982), they have denied coverage to a patient-plaintiff in a case very much like *Lomax*, *see* Head v. Erath Gen. Hosp., Inc., 458 So. 2d 579 (La. Ct. App. 1984), *cert. denied*, 462 So. 2d 650 (La. 1985). They have also denied coverage of their medical malpractice act to a claim that improper security in a hospital resulted in the assault, battery, and rape of a patient. *See* Reaux v. Our Lady of Lourdes Hosp., 492 So. 2d 233 (La. Ct. App. 1986), *cert. denied*, 496 So. 2d 333 (La. 1986).

Further, the Louisiana legislature in 1984 amended a portion of its medical malpractice act's limitation on recovery section to read: "A health care provider qualified under this Part is not liable for an amount in excess of one hundred thousand dollars for all malpractice claims because of injuries to or death of any one patient." La. Rev. Stat. § 40:1299.42(B)(2) (West Supp. 1990). This section previously read "person" where it now reads "patient," making it quite arguable that the legislature intended to remove the question of third party claims like that in *Gahl* from its scope.

However, suggesting a more liberal reading in certain contexts, a Louisiana court has held that, even when alternative theories of liability are available, claims of improper conduct which reasonably come within the definitions of the Act ought to be pursued through the Act. *See* Cashio v. Baton Rouge Gen. Hosp., 378 So. 2d 182 (La. Ct. App. 1979).

30. *Gahl*, 540 N.E.2d at 1263 (Hoffman, J., dissenting) (emphasis in original).

31. 273 Ind. 374, 404 N.E:2d 585 (1980).

32. For discussions detailing the underlying conditions precipitating the enactment of the Indiana Medical Malpractice Act, see *The 1975 Indiana Medical Malpractice Act*, 51 Ind. L.J. 91 (1975), a symposium which contains several articles related directly to the insurability of malpractice and the intended effects of the Act.

Johnson is primarily valuable to this Note for its delineation of the policies underlying the Act. This is important because in each sub-class of claimant coverage disputes, the strength of the position taken by plaintiff and defendant will be judged in part by its conformity to these underlying goals. *Johnson* affirms the constitutionality of the Medical Malpractice Act,[33] and itself involves a derivative claim of parents for wrongful death of a minor child.[34] In *Johnson*, the Indiana Supreme Court analyzed several key provisions of the Act, and focused heavily on the requirement of a pre-trial medical review panel hearing.[35]

Each of the four consolidated cases in *Johnson*[36] involved issues related to the Act's constitutionality. In one of these, *Mansur v. Carpenter*, the defendant produced voluminous evidence, which the court reviewed extensively, as to the condition of the health care industry in Indiana prior to the Act.[37] Various factors played a role in the legislative determination to implement some sort of protection from escalating claims, reduction of coverage availability, and increased health care costs. The court specifically cited the cessation or reduction of malpractice insurance coverage by seven of ten insurance companies then writing policies; a 1200 percent increase in malpractice insurance premiums among those who continued to write policies; the flight of physicians in certain "high-risk" categories of practice into states where coverage was easier or cheaper to obtain; and, the discontinuation of health care services, such as elective surgery, in some locations.[38]

According to the *Johnson* court "[the Act] reflects a specific legislative judgment that a causal relationship existed at the time between the settlement and prosecution of malpractice claims against health care providers and the actual and threatened diminution of health care services."[39] Underlying this legislative conclusion was another conclusion

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33. 273 Ind. at 393, 404 N.E.2d at 597.

34. The derivative nature of the claim by the Johnsons was not an issue on appeal.

35. 273 Ind. at 387-400, 404 N.E.2d at 591-98; *see* IND. CODE § 16-9.5-9-2 (1988). As originally enacted, by Pub. L. No. 146-1975, § 1, this provision read: "No action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this chapter and an opinion is rendered by the panel." IND. CODE ANN. § 16-9.5-9-2 (West 1984).

In 1985, Pub. L. No. 177-1985, § 8, amended this provision. The amendment left the language above intact, but added a provision which allowed the parties to agree not to have a panel convened. *See* IND. CODE § 16-9.5-9-2(b) (1988), which refers to IND. CODE § 16-9.5-9-3.5 (1988), which delineates time limitations for panel action.

36. Johnson v. St. Vincent Hosp. Inc.; Bova v. Kmak; Mansur v. Carpenter; Hines v. Elkhart Gen. Hosp.

37. *Johnson*, 273 Ind. at 379, 404 N.E.2d at 589.

38. *Id.* at 379-80, 404 N.E.2d at 589-90.

39. *Id.* at 379, 404 N.E.2d at 590.

that the escalating levels of malpractice claims and subsequent judgments were causally linked to several facts. First, "the processes by which evidence of negligent conduct was being gathered, evaluated, and used were faulty."[40] Second, habitually negligent health care providers were not being effectively dealt with.[41] Third, excessive attorney's fees were driving up the claimed damages.[42]

The first of these facts, the faulty processes for gathering, evaluating, and using evidence of negligent conduct, is especially relevant to the requirement that all malpractice claims be presented to the medical review panel prior to court action. Regarding this requirement the *Johnson* court noted:

> [Medical malpractice cases] . . . routinely require the ascertainment of technical and scientific facts, procedures, and expert opinions for the purposes of determining whether a breach of legal duty has occurred. The panel submission requirement serves this requirement and tends to insure that a resolution of a dispute will be based upon the ascertainment of the true facts and circumstances and will be fair. . . .[43]

The court concluded that "[t]he requirement of the statute that malpractice claims be first submitted to a medical panel for evaluation is one reasonable means of dealing with the threatened loss to the community of health care services. . . ."[44]

This Note proposes that these justifications are equally viable for third-party claims alleging malpractice, and that inclusion of a broader range of potential claimants than the present case law allows is similarly justifiable. The parties in *Gahl*, arguing on a motion to transfer to the Indiana Supreme Court, each addressed whether the intent of the Act is broad enough to cover the claims made in *Gahl*.[45]

Gahl's estate argued that the circumstances upon which its claim was made render the underlying policy rationale for the Medical Malpractice Act inapplicable.[46] Gahl based this conclusion upon two main points, both of which involve the sort of policy arguments outlined in *Johnson*. First, rather than the Medical Malpractice Act, with its provisions limiting damages to $500,000,[47] the Indiana Tort Claims Act

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40. *Id.* at 380, 404 N.E.2d at 590.
41. *Id.*
42. *Id.*
43. *Id.* at 393, 404 N.E.2d at 597.
44. *Id.* at 387, 404 N.E.2d at 594.
45. Brief for Appellee in Opposition to Petition to Transfer at 13-15, 540 N.E.2d 1259 [hereinafter Brief for Appellee]; Brief for Appellant, *supra* note 7, at 22-25.
46. Brief for Appellee, *supra* note 45, at 12-14.
47. *Id.* at 14.

should apply.[48] According to Gahl, the Indiana Tort Claims Act should apply because all of the defendants are "political subdivisions or employees thereof."[49] This argument carries some weight because there is a limitation of liability of $300,000 under the Tort Claims Act, thereby reducing plaintiff's potential damages.[50] This potential reduction, Gahl argued, undercuts the defendant's policy argument because the cost-cutting rationale of the Act is thereby made irrelevant.[51] Second, the estate noted that the provision of the Medical Malpractice Act limiting recovery explicitly states that "[t]he total amount recoverable for an injury or death of a *patient* may not exceed $500,000."[52] The explicit use of the term "patient" is conclusive in Gahl's view of the intended scope of the Act.[53]

Midtown's policy argument[54] was that excluding this claim from the Act's coverage "has the effect of placing a third-party in a better position than a patient even when the cause of action is based on the same negligent act."[55] This is so, Midtown argued, because third-party claimants would not be subject to a limitation on damages in some cases, nor would they be subject to the medical review panel pre-trial hearing requirement.[56]

Midtown's argument is more consistent with legislative intent. The court's reasoning in denying Midtown's argument could lead to the anamolous result of having extremely similar claims proceeding through different legal channels, with quite different procedural requirements. The difference would be based entirely upon the identity of the claimant rather than the theory of the claim. Further, the decision to exclude third-party, non-derivative claims will not further the explicit legislative goal of reducing either the amount of judgments or health care costs because many claims will not be subject to other limitations such as those imposed by the Indiana Tort Claims Act for claims against governmental bodies.

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48. *Id.* (citing IND. CODE § 34-4-16.5-1 to 34-4-16.5-21 (1988)).

49. *Id.* at 13 (citing IND. CODE § 34-4-16.5-2 (1988)).

50. *Id.* at 13.

51. The appropriate response to this point is to note that the legislature foresaw this potentiality and included a provision to bring such entities within the Medical Malpractice Act. IND. CODE § 16-9.5-1-9 (1988). "A claim based on an occurrence of malpractice against a governmental entity or an employee of a governmental entity, as those terms are defined in IC 34-4-16.5, shall be governed exclusively by this article if the governmental entity or employee is qualified under this article." *Id.*

52. Brief for Appellee, *supra* note 45, at 14 (citing IND. CODE § 16-9.5-2-2 (1984) (emphasis added)).

53. *Id.* at 14.

54. Brief for Appellant, *supra* note 7, at 22-25.

55. *Id.* at 24.

56. *Id.*

III. The Inclusion of Derivative Claims

There is little controversy about whether derivative claims alleging malpractice should come within the Act. This Section presents the conventional rationale for their inclusion and suggests that this rationale applies equally well to third-party non-derivative claims alleging medical malpractice.

Sue Yee Lee v. Lafayette Home Hospital, Inc.[57] is the leading case extending coverage of the Act to derivative claims. The action was brought by a minor for personal injuries and by her parents for loss of services and past, present, and future medical expenses.[58] The claims were all based on medical malpractice. The physicians and hospitals named as defendants filed motions either for summary judgment or to dismiss[59] on the ground that because the claims were based on malpractice, a medical review panel, which had not been convened, was required. The trial court granted defendants' motions, thereby requiring the plaintiffs to file a proposed complaint with the panel.[60]

After holding, on the basis of *Johnson*, that the Act was constitutional,[61] the court addressed the Lees' contention that the parents' action for loss of services and medical expenses fell outside the scope of the Act, and that they therefore should not be required to file their complaint with the medical review panel.[62] The court approached the problem from two angles. First, the court construed the Act[63] because it was "ambiguous and unclear in meaning with regard to whether or not the action of parents for loss of services of, and medical expenses for, a minor child is subject to the act."[64] Second, the court addressed the underlying policy for the Act's creation.[65]

The court's construction of the Act focused upon several definitional and substantive provisions. The most important of the definitions are those of "representative," "tort," "malpractice," and "health care."[66]

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57. 410 N.E.2d 1319 (Ind. Ct. App. 1980).
58. *Id.* at 1320.
59. *Id.*
60. *Id.*
61. *Id.* at 1320-21.
62. *Id.* at 1321.
63. *Id.* at 1322-23.
64. *Id.* at 1323.
65. *Id.*
66. *Id.* at 1321 (quoting Ind. Code § 16-9.5-1-1 (1976)):

(f) "Representative" means the spouse, parent, guardian, trustee, attorney, or other legal agent of the patient.

(g) "Tort" means any legal wrong, breach of duty, or negligent or unlawful

In addition to these definitional sections, the court also noted the substantive provision granting the right to file suit under the Act. The statute provides that "*a patient or his representative* having a claim under this article for bodily injury or death on account of malpractice may file a complaint."[67]

Finally, the court noted the language of the provision requiring that all such claims go through a medical review panel: "No action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this chapter and an opinion is rendered by the panel."[68]

Though not addressing each section separately, the court agreed with the defendants' reading of these sections of the Act and held that the Lees' claims ought to be governed by the Act's provisions.[69] Specifically, it noted that the inclusion of "representative" along with "patient" as among those with a right to state a claim under the Act evinced a legislative intent not to restrict coverage exclusively to patients.[70]

The Lees further argued that because their claim for loss of services was not expressly mentioned in any of the relevant provisions, the principle of *expressio unius est exclusio alterius* ought to apply and exclude their claim from coverage under the Act.[71] The court rejected this argument in strong, sweeping language based not only on its reading of specific provisions, but also on perceived legislative intent:

> [W]e believe the conclusion is inescapable that our *General Assembly intended that all actions the underlying basis for which is alleged medical malpractice are subject to the act.* Since the obvious purpose of the act is to provide some measure of protection to health care providers from malpractice claims, and to preserve the availability of the professional services of physicians and other health care providers in the communities and

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act or omission proximately causing injury or damage to another.

(h) "Malpractice" means any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.

(i) "Health care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment or confinement. . . .

67. *Id.* at 1321 (quoting IND. CODE § 16-9.5-1-6 (1976) (emphasis added)).
68. *Id.* at 1322 (quoting IND. CODE § 16-9.5-9-2 (1976)).
69. *Id.* at 1324.
70. *Id.*
71. *Id.* at 1322.

> thereby protect the public health and well-being, *it is totally inconceivable that the legislature intended to extend this protection only to actions wherein the actual patient was the party plaintiff and to exclude other claims for medical malpractice wherein the plaintiff was not the actual patient, but one whose right of action was derived from the patient such as the parents' claim here.*[72]

The court reasoned that the principle of *expressio unius est exclusio alterius* is a tool to aid in determining legislative intent and not a rule of law.[73] Thus, because the court was certain as to the legislative intent, to apply the principle mechanically in this case would have been absurd.[74]

The above-quoted passage not only refers specifically to derivative claims, but also to "all claims the underlying basis for which is alleged malpractice." Moreover, the court immediately thereafter explicitly repeats the broader scope of its decision in stating that "we believe all persons having causes of actions founded upon alleged medical malpractice are subject to, and must comply with the act."[75] This language clearly creates a larger class of potential claimants, which includes the Lees, but the outer limits of which are not foreclosed by the type of derivative claim they brought. This inclusive language suggests that drawing fine distinctions among different types of malpractice claims by parties attempting to relieve themselves from the structures of the Act is inappropriate.

The claimant in *Gahl* argues that the sub-class of derivative claims acknowledged in *Sue Yee Lee* is the full extent of the intended scope of claimant coverage under that decision. Gahl further argued from the very existence of an inquiry into the identity of the party pressing the claim that had the court thought inclusion or exclusion of a claimant from the Act turned only on the form of claim, it would not have had to address the Lees' position in relation to the patient.[76]

Gahl also cited a decision by the Indiana Supreme Court, *Community Hospital v. McKnight*,[77] as grounds for limiting the field of potential claimants under the Act to patients and representatives only.[78] In *McKnight*, the court held that "representatives" included a spouse and son of a patient within the meaning of the Medical Malpractice Act, and that

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72. *Id.* at 1324 (emphasis added).
73. *Id.* at 1324.
74. *Id.*
75. *Id.*
76. Brief for Appellee, *supra* note 45, at 11.
77. 493 N.E.2d 775 (Ind. 1986).
78. Brief for Appellee, *supra* note 45, at 12.

they did not have to meet conditions precedent under the Indiana Wrongful Death Statute[79] prior to filing a claim for malpractice. In so holding, the court stated that the definitions of "patient" and "representative" of the Medical Malpractice Act "clearly designate who is qualified to prosecute a claim."[80] The definition of "representative" appears earlier in this Note.[81] The definition of "patient" under the Act is as follows:

> (c) "patient" means an individual who receives or should have received health care from a licensed health care provider, under a contract, express or implied, *and includes any and all persons having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice on the part of a health care provider.* Derivative claims include, but are not limited to, the claim of a parent or parents, guardian, trustee, child, relative, attorney or any other representative of the patient including claims for loss of services, loss of consortium, expenses and other similar claims.[82]

This definition, along with that for "representative," and that section of the Act allowing "a patient or his representative having a claim under this article for bodily injury or death on account of malpractice [to] file a complaint,"[83] formed the basis for the Indiana Supreme Court's holding in *McKnight* that a spouse and child of a patient need not comply with the Wrongful Death Statute because they clearly fall within the Medical Malpractice Act language.[84]

Gahl used this holding as grounds for the conclusion that *only* those named in these sections are able to file under the Act. This rationale is virtually identical to the rejected argument in *Sue Yee Lee* that the principle of *expressio unius est exclusio alterius* applied, and it is subject to the same critique. The principle is a tool of interpretation of the statute as a whole and not a rule of law. Therefore, mechanical application of the principle would beg the very question at issue, the

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79. 493 N.E.2d at 777 (citing IND. CODE § 34-1-1-2 (1982)).

80. *Id.*

81. *See supra* note 66 and accompanying text. The definition of "representative" remained the same between the two cases.

82. IND. CODE § 16-9.5-1-1(c) (1988) (emphasis added). This subdivision was amended by Pub. L. No. 120, § 1, emerg. eff. Feb. 19, 1982. Prior to this amendment it read: "'Patient' means a natural person who receives or should have received health care from a licensed health care provider, under a contract, express or implied."

83. *See* IND. CODE § 16-9.5-1-6 (1988).

84. 493 N.E.2d at 777. The Supreme Court in *McKnight* found the language of the Act unambiguous with respect to the standing of those pressing derivative claims, although the court in *Sue Yee Lee* found it ambiguous and unclear. *See Sue Yee Lee*, 410 N.E.2d at 1323.

character of legislative intent. The court in *Sue Yee Lee*, finding the language of the sections under scrutiny ambiguous, took an overview of the Act in an attempt to elicit from the Act's general thrust who should be included and excluded from the Act's coverage.

In opposition, Midtown, in its brief, cited the broad, inclusive language of *Sue Yee Lee* in arguing for inclusion of Gahl's claim within the Act.[85] There was a further, textual argument available to Midtown. The net cast by the legislature in its new definition of "patient" is so broad ("any and all persons having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice on the part of a health care provider"),[86] that one may infer that this language was the legislature's attempt to adopt the broadest possible definition of the term. This definition, if read in connection with the court's broad language in *Sue Yee Lee*, although clearly encompassing "patients" within the common sense meaning of the term, may be read as including the sort of claimant represented by the estate of probation officer Gahl.

Broadening the scope of claimant coverage through the definition of the term "patient" is awkward in one respect, but makes good sense in another. It is awkward because of the tension between the clarity of the common sense meaning of the term and the conceptual difficulty of including others who are not "patients" within this meaning. The definition of "patient," however, clearly and explicitly includes those who have derivative claims. These persons would not be "patients" within any common sense meaning of the term, yet they are included within the statutory definition of the term. Nor did the legislature stop there; it provided for all claims "whether derivative or otherwise."[87] Had it intended to limit the scope of coverage to patients and those with derivative claims, the legislature could have chosen much narrower language.

Notwithstanding the conceptual stretch required to insert claimants "derivative or otherwise" into a definition of "patient," to do so makes good sense. Because patients are the paradigmatic claimants in malpractice suits, one would look to the definition of "patients" first in order to understand the intended scope of claimant coverage.[88] Therefore, it makes

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85. *See* Brief for Appellant, *supra* note 7, at 15-16.

86. IND. CODE § 16-9.5-1-1(c) (1988).

87. *Id.*

88. If the legislature did intend, or will wish in the future, to include third-party claims such as those in *Gahl*, and thereby merge to some degree the notions of "claimant" and "patient," it would make sense, given the conceptual awkwardness of this merging, to create a new definition of "claimant" and have it read to include, explicitly, third-party claims which are not derivative. Alternatively, a definition of "malpractice" could be phrased to include specifically third-party claims as long as the claim involved alleged

little sense to separate derivative and non-derivative third party claims on the basis of the statutory definition of "patient."

IV. Marginal Cases Involving Actual Patients

A. "Slip and Fall" Cases

This Section discusses cases involving patients within the ordinary meaning of that term, but whose claims only marginally arise from their status as patients. It begins with a case limiting the scope of the Act, but concludes that courts generally have been flexible in their interpretations of who belongs in the category of "patient" under the Act. The Section ends with the suggestion that this flexibility should also be applied to the third-party, non-derivative medical malpractice claim.

The decision in *Winona Memorial Foundation of Indianapolis v. Lomax*[89] is in contrast to the expansive view of the Act's coverage represented by *Sue Yee Lee*. In *Lomax*, the court held that the claim of a patient who fell while in the hospital was not a malpractice claim within the meaning of the Act, and it refused to require the plaintiff to conform to the requirements of the Act.[90] The court rested its conclusion on the fact that included within the plaintiff's claim, and in her affidavit filed in response to defendant's motion for summary judgment,[91] was a clear and unambiguous premises liability claim,[92] and that the Act therefore was not controlling. The court thus focused on the form of the claim and not the character of the claimant in deciding whether or not the Act controlled the dispute.

As did the court in *Sue Yee Lee*, the *Lomax* court relied heavily on the legislative history of the Act and on its underlying purposes. The *Lomax* court, however, invoked legislative history and purpose to support its conclusion that this claim fell outside the intended scope:

> [T]he conditions that were the impetus for the legislature's enactment of the Medical Malpractice Act had nothing to do with

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acts of malpractice. In fact, the present definition of "malpractice" may do just that when combined with the definition of "tort." *See supra* note 5 and accompanying text. To make this even clearer, the legislature could effect this combination in a new definition of "malpractice."

89. 465 N.E.2d 731 (Ind. Ct. App. 1984).

90. *Id.* at 742.

91. The court cited *Rioux* (*see supra* note 17) as a case wherein the plaintiff failed to respond adequately when faced with a motion for summary judgment. In *Rioux*, the plaintiff rested on her pleading in response to a motion by defendants for summary judgment and the court refused to allow the factual allegations in her pleadings to suffice for a response. 438 N.E.2d 317.

92. *Lomax*, 465 N.E.2d at 742.

> the sort of liability any health care provider - whether a hospital or a private practitioner - risks when a patient, or anyone else, is injured by the negligent maintenance of the provider's business premises. That not being the sort of liability that brought about passage of the Act, it is absurd to believe the legislature would have reached out to restrict such liability by including it within the Act.[93]

In tandem with the policy justification for its decision, the *Lomax* court rested on a logically related evidentiary issue. A primary rationale for the existence and function of the medical review panel is to provide a regulated forum for expert testimony on the medical issues present in a case.[94]

The traditional justification for expert testimony is that the facts about which such witnesses testify are outside the common knowledge of lay witnesses.[95] According to the *Lomax* court, "[s]uch matters as the maintenance of reasonably safe premises are within the common knowledge and experience of the average person."[96] Therefore, expert testimony in the form of the panel is unnecessary and not required when the issue is couched in premises liability terms, or in any terms which the court determines state a claim about which common knowledge is sufficient.[97]

This reasoning is compelling, but there is a troublesome inconsistency between the *Lomax* decision and the earlier *Rioux* decision.[98] In *Rioux*, the court reversed a lower court decision denying summary judgment to a defendant asserting that the plaintiff's claim came within the Act and should go before the medical review panel. The facts of *Rioux* are

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93. *Id.* at 739.

94. *Id.* at 740. The opinion of the medical review panel is made admissible as evidence in courts of law and panel members are required to testify at trial if called by either party. *See* IND. CODE § 16-9.5-9-9 (1988).

95. There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952), *quoted in* FED. R. EVID. 702 advisory committee's note.

96. 465 N.E.2d at 740.

97. The attorney for the hospital in *Gahl* cited the court's reasoning here in arguing that the claim in *Gahl* was not outside the Act. He agreed with the *Lomax* court's focus on the type of claim made and not on the identity of the person making the claim. Brief for Appellant, *supra* note 7, at 13.

98. *Rioux*, 438 N.E.2d 315 (Ind. Ct. App. 1982).

very similar to those in *Lomax*,[99] but the complaint in *Rioux* was grounded more heavily upon the appropriateness of the hospital's care and less heavily on any other common law theory such as the premises liability claim in *Lomax*.[100]

Although the *Lomax* court's attention to the theory of the claim is legitimate, given its need to decide whether the complaint alleged a malpractice claim or some other, it is arguable that the court rested too heavily on the theory, rather than on the facts presented, in determining the treatment of the claim. Hospital-bound persons-patients are often in a condition different enough from the ordinary person to justify expert testimony on even the custodial aspects of their treatment.

A spectrum of possible factual situations exists, externally similar to *Lomax* and *Rioux*, but wherein various conditions of the patient tend to make the question either one of malpractice or one of simple negligence. Facts suggesting lack of appropriate medical care arise, for example, in situations where a patient, unable to walk without the aid of a mechanical device or the help of another, or one whose vision is impaired, is allowed to move freely and falls on a stair. Conversely, where a patient, who is within the hospital simply for testing, falls on a stair, the occurrence suggests nothing more than simple negligence.

Between these two extremes are many ambiguous possibilities. For example, suppose a hospital which has written policy requirements for patients experiencing alcoholic tremors, admits a patient for chronic alcoholism who displays mild, intermittent tremors. If this patient were injured in a fall during a period of relatively good bodily control, questions would arise whether he had been in a condition making medical care necessary at the time of the injury. To allow a plaintiff's formulation of his complaint to control the initial disposition of the claim is to place in his hands a fundamental function of the finder of fact.

Counsel for a patient injured under circumstances suggesting both simple ministerial negligence and lack of appropriate medical care may be tempted to allege whichever claim would yield a higher potential recovery. Yet, the finder of fact should be entitled to determine, with expert testimony if necessary, all of the conditions under which the injury occurred and whether there was a malpractice element involved in the injury.

Even if only a simple negligence claim would lie from certain facts arising outside a medical setting, the character of a claim based on

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99. In each case the patient fell during a hospital stay. Assuming that the court in *Lomax* adequately distinguished *Rioux* on the procedural ground, the underlying question of coverage of the Act remains.

100. *Lomax*, 465 N.E.2d at 741.

similar facts, if arising within a medical setting, should be determined not only by the terms of the claim itself, but by the condition of the patient. It will often require expert opinion on that medical condition to determine whether, in fact, the claim is simply a non-medical tort claim, or whether there were medical factors at issue. The medical review panel's consideration should not be limited only to those claims predetermined by one or all of the parties as medical or non-medical. It follows from the panel's primary duty to aid the trier of fact in understanding medical issues, that the panel should be allowed to distinguish between such marginal claims on medical grounds as part of its duties. Otherwise the parties, especially plaintiffs, may indirectly decide the law. A broader field of view for the medical review panel would help eliminate strict reliance by the courts solely on the "form" of the claimant's allegation, and possibly cost less money because the need for interlocutory appeals as in *Gahl* could be avoided.

In cases like *Lomax* and *Rioux* the panel would be able, if the facts and issues were presented to them, to decide whether the condition of the patient and the circumstances of the patient's injury were such as to require expert opinion on the medical aspects, if any, of the dispute. There may very well be issues of fact, based on the patient's condition, which render appropriateness of medical care relevant to determination of whether malpractice occurred.

The *Lomax* reasoning also arguably undermines the contract-based theory of medical malpractice claims.[101] Patients admitted to a health-care facility, or even those on a routine office visit, arguably enter into a contract, either implicit or explicit, for care by the health-care provider. This places even a disputably non-medical claim in a different context than the analogous common law claim because, in any case, the admitted party contracts for an appropriate level of care, and that level of care depends, at least in part, on the condition of the patient. This is not to deny that there are some claims which simply do not come within the scope of the legislature's intent underlying the Act. It is strongly inferable, however, that medical care of patients is at issue whenever the role of caretaker is assumed by a health care provider.

The Indiana Supreme Court, in its consideration of whether to grant Midtown's motion to transfer *Gahl*, was faced with competing interpretations of the appropriate precedential value of *Lomax* and *Rioux*. Midtown, in its motion in support of petition to transfer, argued that the Court of Appeals erred in its focus upon the identity of the claimant

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101. IND. CODE § 16-9.5-1-1(c) (1988). "'Patient' means an individual who receives or should have received health care from a licensed health care provider, *under a contract, express or implied*, ..." (emphasis added).

as determinative of the coverage issue under the Act.[102] Instead, Midtown urged, it should have focused on the fact that malpractice was alleged in the claim and upon the facts supporting the claim. Midtown relied heavily upon the *Rioux* holding that "the Act applies to *any* legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury to another based on any act or treatment performed or furnished, or which should have been performed or furnished . . . [to the patient]."[103]

In contrast, Gahl's estate, in its brief opposing the petition to transfer, passed lightly over *Rioux*[104] and focused heavily upon *Lomax* for support for its contention that only patients and representatives must proceed under the Act.[105] Gahl's argument treats the identity of the plaintiff and the form of the claim as necessary conditions, though neither as sufficient by itself, to the inclusion of a claim within the Act.[106] Gahl's estate, relying on its reading of *Rioux* and *Lomax*, argued that Indiana courts have "implicitly recognize[d] that before a plaintiff is required to proceed under the Act, it must be established that a plaintiff is a patient."[107]

Stated in the terms of each side's briefs in *Gahl*, the issue presented by *Lomax* and *Rioux* becomes a disjunction: either the focus ought to be on the malpractice character of the claim and the facts underlying it (according to Midtown) or upon the identity of the claimant in combination with the character of the claim (according to Gahl). Gahl's position is simply too narrow a view in light of the legislative intent and the majority of existing case law. The determination of the placement of claims in ambiguous cases ought to be made by the medical review panel on the basis of as clear and unambiguous a statement of the facts as possible. When marginal cases are brought to court before being filed with a medical review panel, the trial court should require a panel opinion in those cases which reasonably can be construed as coming within the Act.[108] The tension created by *Lomax* and *Rioux* sets up a

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102. Brief for Appellant, *supra* note 7, at 13.

103. *Id.* (quoting 438 N.E.2d at 316).

104. Brief for Appellee, *supra* note 45, at 9 (noting only that in *Rioux* the issue was not whether the claimant was a patient).

105. *Id.* at 10, 13.

106. *Id.*

107. *Id.* at 10.

108. Under IND. CODE § 16-9.5-10-1 (1988), if an action arguably based on malpractice is filed with the commission of insurance, before the panel renders its decision, the trial court may rule preliminarily on issues of fact or law not requiring expert opinion. *See, e.g.*, Johnson v. Padilla, 433 N.E.2d 393 (Ind. Ct. App. 1982); State *ex rel.* Hiland v. Fountain Circuit Court, 516 N.E.2d 50 (Ind. 1987).

In the present discussion, this provision is important as a safety value through which cases may go if, indeed, there are *no* issues which require expert medical opinion. However,

situation in which certain plaintiffs may, simply by stating their claims in a specific form, bypass the Act unjustifiably and at the very least create delay in the efficient adjudication of their claims.

B. "Involuntary" Patients

The next area of concern with the scope of claimant coverage under the Act is represented by two similar cases: *Detterline v. Bonaventura*[109] and *Scruby v. Waugh*.[110] Each case deals with a wife who, with the cooperation of a physician, had her husband involuntarily committed to a mental facility. In each case, the husband later sued the physician without filing a proposed complaint with the medical review panel, but ultimately was required to file anyway. This outcome, as well as the reasoning which supports it, is further evidence that the courts have broadly interpreted the scope of the Act, and have seen beneath the literal language of the Act to allow ambiguous claims to be included.

In both *Detterline* and *Scruby* the issue was largely confined to the definition of "patient" under the Act.[111] The wife in *Detterline* had pleaded with her own physician, Dr. Bonaventura, to sign commitment papers for her husband. Without examining the husband (Mr. Detterline), Dr. Bonaventura signed these papers on the basis of Mr. Detterline's alleged "[m]ental confusion [and] delusions due to chronic alcoholism and cirrohosis of the liver."[112] Mr. Detterline was then involuntarily committed to a hospital for custody, care, and treatment. The commitment papers required the physician to state that an examination of the "patient" occurred and required the physician to specify the date of the examination. Dr. Bonaventura filled in this section, falsely stating that the examination took place on the day he had met with the wife. At trial, Dr. Bonaventura made no claim that he had examined Mr. Detterline on the day designated on the commitment papers.

The court focused on the fact that nearly one year before the commitment Dr. Bonaventura took Mr. Detterline's blood pressure, which established as a minimal showing that there was a patient-physician relationship between the two men.[113] The court further held that the

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when the issue of an appropriate standard of patient care is raised, this ought to be prima facie grounds for proceeding to the panel. A Louisiana court has held that even when alternative theories of liability are available, claims of improper conduct which reasonably can be said to come within the definitions of the Act, ought to be pursued through the Act. Cashio v. Baton Rouge Gen. Hosp., 378 So. 2d 182 (La. App. 1979).

109. 465 N.E.2d 215 (Ind. Ct. App. 1984).

110. 476 N.E.2d 533 (Ind. Ct. App. 1985).

111. *See supra* note 82 and accompanying text for the definition of "patient."

112. *Detterline*, 465 N.E.2d at 216.

113. *Id.* at 217.

requirement, contained in the statutory definition of "patient," that the relationship between physician and patient be based on a "contract, express or implied," did not require the contract to be between the patient and the physician: "[A]lthough a contract is required for health care services, the person receiving the health care need not be a contractual party."[114] Mrs. Detterline's contract with Dr. Bonaventura fulfilled this loosened requirement in this case.

In *Scruby*, decided a year after *Detterline*, the question was almost identical to that in *Detterline*. In *Scruby*, however, the relationship between the committing physician and the committed patient was much closer. As in *Detterline*, the physician signed commitment papers without an immediately preceding examination. In *Scruby*, however, the physician clearly made several examinations very near the date of commitment.[115] The court reversed the lower court decision which denied the physician's motion for summary judgment on identical grounds and cited *Detterline*.[116]

The flexibility of the courts' interpretations of the term "patient" suggests an analogous flexibility in the broader third-party context at issue in *Gahl*. The contract requirement, from the language of the Act, appears to apply to the typical patient-physician relationship. Yet, when the claim is clearly one which has a malpractice claim at its base, the courts are willing to find that the contract requirement is flexible enough to cover cases in which the "patient" is not a party to the contract. Similarly, in *Gahl*, where the court appears to find at least some of the essential elements of malpractice present,[117] analogous reasoning could be used to include the claim even though literally not *all* the elements of the definition of "patient" are present when a contract between the physician and patient is lacking. This argument is especially compelling when, as in *Detterline*, the physician admitted that he signed the commitment papers for Mr. Detterline under false pretenses of examining him on the date specified, and the court was still willing to find the statutory requirements satisfied.

Midtown chose not to discuss the potential relevance of these two cases in any of the briefs presented on behalf of the defense. Gahl,

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114. *Id.* at 219 (citing Gooley v. Moss, 398 N.E.2d 1314 (Ind. Ct. App. 1979) (The court held that a woman, who had been involuntarily sterilized and later filed suit against the surgeon with whom she had not contracted, was a "patient" due to a contract between the physician and the Department of Public Welfare.)).

115. 476 N.E.2d at 535.

116. *Id.* at 536.

117. The court in *Gahl* stated that "[a]ssuming the defendants had a duty to properly medicate and supervise Jackson, we believe that a breach of that duty could constitute malpractice as to Jackson, but not as to third parties with whom Jackson might come into contact." 540 N.E.2d at 1262.

however, cited both and argued that the very need to decide whether the husband in each case was a "patient" within the meaning of the Act conclusively demonstrated that the character of the claimant is an integral factor in the decision whether a claim falls within the Act.[118] This is a compelling point, but answerable with two contentions. First, the courts in both *Detterline* and *Scruby* decided the issue of whether the claimant was a patient because those claims turned on the existence of a contract, although in *Gahl* this was not an issue. Second, the courts' stretch, especially in *Detterline*, to include a marginal claimant evinces a desire for inclusiveness rather than exclusiveness. The behavior of a health care provider is neither more nor less negligent because of the identity of the ultimate recipient of the injury resulting from that negligence.[119]

Hypothetical examples illustrating this point include a wide range of common sense circumstances. For instance, consider the over- or under-medication of a patient with a condition affecting muscular control, such as epilepsy. Injury to a patient clearly could include unexpected and dangerous seizures. Injury to third-parties may result from an automobile accident due to an unexpected seizure or lack of alertness associated with over-medication. To argue that the *medical* issues involved in each case are different, or that the medical review panel has a different job to do or no job at all, depending on the ultimate recipient of the injury, would be groundless. The court may consider these other issues after the medical review panel renders its decision on the strictly medical issues. The sub-group of medical issues, however, still requires medical expert testimony, not on the basis of the recipient of the injury, but on the basis of the provision of medical care to the party receiving it.

V. Protection of Third-Parties Under the Act: Should the Act be Read to Reach This Far?

In the sort of case discussed at the end of the last Section, the injured party may not be a patient, but a third party allegedly injured as a result of medical action taken or omitted on behalf of a patient. The first Indiana case considered here which is relevant to problems

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118. Brief for Appellee, *supra* note 45, at 12-13.

119. Of course, questions of causation loom large when a third party is the recipient of the injury, and this issue must be considered with extreme care in this context. But, because of this special need to focus on causation, the standard of care, the very center of the medical negligence cause of action, will become an even more crucial element in the third party context. Therefore, expert medical opinion on this standard of care will be even more important. Thus, the removal of these cases from the malpractice context may be positively counterproductive to the ultimate purpose underlying the statutory regulation of these causes of action.

raised by these situations is *Ogle v. St. John's Hickey Memorial Hospital.*[120] The claimant in *Ogle* was a patient, but the case raises a question analogous to the situation presented in *Gahl.* In *Ogle*, a patient who was raped by another patient while being held in a psychiatric ward of a hospital sued the hospital for failure to provide adequate security, and the court granted the defendant's motion to dismiss based on the plaintiff's failure to submit the claim to the medical review panel.[121]

In affirming the lower court's dismissal of claims against the defendants, the court of appeals was compelled to place the case either in the class of cases represented by *Rioux* or the class of cases represented by *Lomax.* Citing *Rioux*, counsel for the hospital claimed that the plaintiff placed in issue the appropriateness of care provided by the hospital by alleging that the hospital provided improper security.[122] Counsel for plaintiff cited *Lomax* as controlling on the ground that the claim was, as in *Lomax*, "ministerial" or non-medical in nature and ought to be controlled by a general liability theory.[123]

The court, by agreeing with the hospital, confronted several of its own earlier decisions which held that "neither the guarding and protection of mental patients nor the decision to restrain a patient confined in a wheelchair are medical acts."[124] The court held that these decisions had been, "in effect . . . overruled by exercise of the legislative will expressed in broad language."[125] With this conclusion the court re-opened the door to the sort of claim at issue in not only the third-party claimant context, but also in the "slip and fall" context involved in *Lomax* and *Rioux.* The *Ogle* court took a liberal view of the legislative intent in passing the Act: "[T]hose seeking to avoid coverage under the Act travel a rocky road. The framers of the Act used *broad* language."[126]

However, the court did not approach the question of malpractice from the point of view of the care provided to the patient accused in the rape; it focused instead on the protection provided to the patient raped. This was the most logical course for the court to take because the plaintiff was a patient at the time of the injury. However, had the plaintiff taken the former course in alleging a malpractice claim, the court would have encountered a question more closely analogous to the

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120. 473 N.E.2d 1055 (Ind. Ct. App. 1985).

121. *Id.* at 1056.

122. *Id.* at 1057.

123. *Id.*

124. *Id.* at 1059 (citing Breese v. State, 449 N.E.2d 1098 (Ind. Ct. App. 1983)); Emig v. Physicians' Physical Therapy Serv., Inc., 432 N.E.2d 52 (Ind. Ct. App. 1982); Fowler v. Norways Sanitorium, 112 Ind. App. 347, 42 N.E.2d 415 (1942).

125. *Ogle*, 473 N.E.2d at 1059.

126. *Id.* at 1057 (emphasis in original).

question in *Gahl*. That is, could the care provided to the patient-assailant, rather than to the patient-plaintiff, have been grounds for a malpractice claim? The Act is silent with respect to this question, and *Gahl* is the only Indiana case which addresses the question in the context of the Act. The *Ogle* court's reasoning, however, suggests a tendency toward inclusiveness.

Classification of injuries to third parties through the conduct of psychiatrists also suggests inclusiveness in the present context. In several jurisdictions without malpractice statutes or without statutes comparable to Indiana's, courts have held psychiatrists liable for injury to third parties which proximately resulted from the psychiatrist's treatment.[127] Courts have also held that a psychiatrist may be held liable, regardless of his treatment of a patient, for failure to warn a potential victim if he knows a patient presents a danger to an identifiable victim.[128] This, of course, would also be in line with Indiana legislation allowing partial immunity to mental health care providers for failure to warn, but which also disallows immunity in cases in which the patient had made threats to identifiable victims or generalized threats.[129]

The closest Indiana courts have come to deciding this issue is in *Estate of Mathes v. Ireland*,[130] which arose six years prior to the mental health care immunity provision. In *Mathes*, the appellate court reversed the trial court's dismissal of claims against two psychiatric centers for wrongful death brought by the estate of a woman killed by a former psychiatric patient. The court held that, "if the centers, or either of them, had actually taken charge of Pierce [the patient-accused] . . ., and additionally had actual knowledge that Pierce was extremely dangerous, . . . then we think they were bound to exercise reasonable care[5] under the circumstances."[131]

In footnote "5," the court addressed the issue of the standard of care: "We observe, without deciding, that those jurisdictions which permit

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127. *See, e.g.,* Watkins v. United States, 589 F.2d 214 (5th Cir. 1979); Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980); Merchants Nat'l Bank & Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967); Lungren v. Fultz, 354 N.W.2d 25 (Minn. 1984); McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979); Homere v. State, 48 A.D.2d 422, 370 N.Y.S.2d 246 (1975); Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1980). For recent law review articles discussing liability of psychiatrists for injury to third parties, see Note, Kirk v. Michael Reese Hosp. Medical Center: *The Treatment of a Third Party Plaintiff in a Medical Context*, 38 DE PAUL L. REV. 749 (1989); Note, *Physician Negligence and Liability to Third Persons*, 22 SUFFOLK U.L. REV. 1153 (1988).

128. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

129. *See supra* note 7.

130. 419 N.E.2d 782 (Ind. Ct. App. 1981).

131. *Id.* at 785.

an action on this basis are careful to define *the standard of reasonable care as that due from similar professionals in a field where there remains considerable uncertainty of diagnosis and tentativeness of professional judgment.*"[132]

This language again raises that part of the policy rationale underlying the establishment of the medical review panel concerning the need for a regulated forum of uninterested expert medical opinion. The plaintiff in *Mathes* based its complaint on the Wrongful Death Statute, so the issue of coverage of the malpractice statute did not arise.[133] The court was clearly aware of the evidentiary implications of the claim regardless of the theory under which it was brought. It evinced sensitivity to the need for expert opinion in an area confusing both to those who practice in the field, and to laypersons who are neither conversant nor able to form sufficiently informed opinions without the help of experts.

In *Gahl*, Midtown focused on this aspect of the *Mathes* decision.[134] Under the various decisions cited in *Mathes* from other jurisdictions where the question received greater attention,[135] the rule which emerges, in Midtown's view, is that recovery is conditioned upon: 1) the existence of a patient-therapist relationship, 2) actual or constructive knowledge on the therapist's part that the patient was dangerous, 3) the foreseeability of the plaintiff as a victim, and 4) whether the therapist took reasonable care under the circumstances to discharge his duty to the plaintiff.[136] Within this rule there are intertwined questions of law and fact which must be sorted out by the court and the finder of fact at trial. The decision of a medical review panel on the existence or non-existence of malpractice in these circumstances is beneficial to the court and the finder of fact at trial in deciding the ultimate issues in the case. The explicit language of the Act does not preclude the need for a medical review panel opinion in this area.

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132. *Id.* n.5 (emphasis added).

133. In *Mathes*, Justice Hoffman argued, in an opinion concurring in part and dissenting in part, that medical malpractice actions "may be initiated only by the patient or his immediate family. The duty to use reasonable care in the diagnosis and treatment, including commitment proceedings, does not exist for the benefit of strangers to the physician-patient relationship. The complaint therefore fails to state a claim for relief in this regard." *Id.* at 788. This position is in tension with Justice Hoffman's position in his dissent in *Gahl*. *See supra* note 30 and accompanying text.

134. Brief for Appellant, *supra* note 7, at 19.

135. *Id.* at 20. White v. United States, 780 F.2d 97 (D.C. Cir. 1986); Jablonski v. United States, 712 F.2d 391 (9th Cir. 1983); Michael E.L. v. County of San Diego, 183 Cal. App. 3d 515, 228 Cal. Rptr. 139 (1986); Thompson v. Alameda County, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); Bardoni v. Kim, 151 Mich. App. 169, 390 N.W.2d 218 (1986); Bader v. State, 43 Wash. App. 223, 716 P.2d 925 (1986).

136. Brief for Appellant, *supra* note 7, at 20.

The reasoning above is relevant to the decision in *Gahl*. However, in light of the Indiana statute which grants limited immunity to mental health care workers,[137] enacted after Gahl's complaint was filed, the reasoning will be slightly different. This new provision grants immunity for failure to warn or predict, unless the health care provider received some form of notice. It provides two exceptions to this limited immunity: first, where the patient communicated an actual threat to a "reasonably identifiable victim or victims," and second, where the patient "evidences conduct or makes statements indicating an imminent danger that the patient will use physical violence or use other means to cause serious personal injury or death *to others*."[138] Thus, facts related to these issues will need to be the focus of inquiry before liability can be assigned, but the basic logic of the *Mathes* holding will still be applicable.

Further, this provision does not grant immunity for any other form of potential treatment provided by a health care provider to a psychiatric patient. This failure to name other sources of liability as among those for which providers are immune implies that the legislature intended to immunize only for the limited area of failure to warn or predict when there has been no sign given to mental health care workers of dangerousness. It would have been logical for the legislature, had it intended a broader immunity, simply to immunize mental health care workers from suits based on *any* treatment afforded patients.

In a case such as *Gahl*, and perhaps *Ogle*, the plaintiff may forward claims which are completely separate from these two potential areas of provider responsibility. In fact, in *Gahl* the complaint states several allegations of malpractice which fall distinctly outside the scope of the immunity provision.[139] These claims are commonly cited grounds for malpractice claims. The argument that the facts supporting the allegations, rather than the identity of the claimant, should determine the application of the Act is supported here, even in the context of the immunization provision.

VI. Conclusion

The conclusion which emerges from analysis of the legislative intent, statutory language, and existing case law under the Indiana Medical Malpractice Act, in all of the areas discussed in this Note, is that a liberal inclusiveness is the appropriate approach for courts to take when

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137. *See supra* note 7 for statute.

138. Ind. Code § 34-4-12.4-2 (1988) (emphasis added).

139. Brief for Appellant, *supra* note 7, at 16-17 (citing paragraphs 10, 21, 23, and 33 of complaint dealing variously with failure to properly medicate, abdication of treatment, misdiagnosis, and wrong recommendations in the treatment of the patient-defendant).

confronted with an ambiguous case. There is no clear language in the Act which limits the class of claimants to a specified group. On the contrary, the broad definitions of such terms as "patient" yield the conclusion that the legislature intended to be inclusive rather then exclusive of borderline claims.

The case law yields a similarly expansive interpretation of the Act's coverage. Only in *Lomax* and *Gahl* have the courts read the Act narrowly. Perhaps the *Detterline* court's willingness to stretch the notion of contract to include a physician-patient relationship created by means of a false examination record may be the most obvious illustration of the preference in favor of flexibility in interpreting the scope of the Act.

Underlying both statutory interpretation and case law analysis is the original intent of the legislature in enacting the Indiana Medical Malpractice Act in 1975, as outlined by the Indiana Supreme Court in *Johnson*. This intent is construed, in *Sue Yee Lee* for example, in language easily broad enough to cover claims by third parties injured through alleged malpractice to patients. This spirit of inclusiveness should guide the courts in future disputes involving the scope of claimant coverage under the Indiana Medical Malpractice Act.

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The Short History of a Rule of Evidence That Failed (Federal Rule of Evidence 609, *Green v. Bock Laundry Machine Co.*[1] and the New Amendment)

In 1976, 14-year-old Michael Moore was injured when he accidentally rode his bicycle beneath a tractor-trailor as it turned into a neighbor's driveway. Years later, in the personal injury litigation that followed,[2] a central issue became whether Michael's 1980 and 1982 felony convictions[3] could be used to impeach his credibility as a witness. In a decision affirmed by the First Circuit, the trial court said yes, applying Rule 609(a) of the Federal Rules of Evidence.[4] Although there is no way of knowing the decisiveness of this evidence, the jury rejected Michael's personal injury claim.

Whether the criminal record of a witness is any reflection on his propensity for truthfulness has long been a subject of debate.[5] Yet, as

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1. 109 S. Ct. 1981 (1989).

2. Linskey v. Hecker, 753 F.2d 199 (1st Cir. 1985).

3. Michael's criminal record consisted of seven larcenies, six burglaries, one armed robbery, and one shoplifting conviction. *Id.* at 201.

4. FED. R. EVID. 609(a) provides:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

On January 26, 1990, in response to concerns which are the subject of this Note, the Supreme Court submitted to Congress an amendment to Rule 609. Unless Congress decides otherwise, this amendment becomes effective December 1, 1990. *See infra* note 110 and accompanying text.

5. As framed by the Federal Rules of Evidence, the issue is really whether a *recent* conviction for a *serious* crime, such as murder or theft, is a reliable indication of a witness's credibility. The necessary implication of Rule 609 is that under some circumstances, at least, it is.

Under the Rule, the seriousness of the crime is defined by the punishment involved (only crimes "punishable by death or imprisonment in excess of one year" are admissible). FED. R. EVID. 609(a). The recentness of the crime is prescribed by a provision saying the conviction is not admissible unless it occurred in the last 10 years (or the witness was released from prison within that time), unless the court decides "in the interests of justice, that the probative value of the conviction . . . outweighs its prejudicial effect." FED. R. EVID. 609(b).

It should also be noted that Rule 609(a)(2) places certain crimes thought to be especially relevant to veracity, usually called *crimen falsi*, in a separate category. These crimes, such as perjury and fraud, are always admissible if they satisfy the recentness

intriguing as that philosophical question is,[6] and despite its troubling implications,[7] federal courts have been far more consumed by a problem that at first glance seems purely technical. For more than a decade, the ambiguous wording of Rule 609(a) has led to widespread confusion over exactly what the Rule is, and how Congress meant for it to apply in the civil litigation context — if it meant anything at all. Almost from its adoption[8] Rule 609 has suffered from contradictory interpretations in different parts of the country. Had Michael Moore brought his personal injury claim in Louisiana instead of Massachusetts, his convictions might never have been a factor in his allegation that a truck driver had been negligent.

Interestingly, the recent Supreme Court decision that was supposed to have resolved the difficulty, *Green v. Bock Laundry Machine Co.*,[9] only muddied the waters even as it created uniformity. Through its endorsement of much-criticized Third[10] and Seventh Circuit[11] schemes of mandatory civil admissibility, the Court instantly transformed talk about amending Rule 609 from a speculative pursuit into a matter of legal necessity. Although it now appears that such an amendment will become law,[12] the debate in a larger sense may have just begun. The developments surrounding *Green* have not only stirred up new interest in the Rule's

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requirement of Rule 609(b).

Even if admissible, courts usually do not allow detailed explanations of crimes, instead confining testimony to "essentials," such "as the name of the crime, the time and place of prosecution, and the punishment imposed." G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 345 (2d ed. 1987). *See also* E. CLEARY, MCCORMICK ON EVIDENCE § 43, at 98 (3d ed. 1984).

6. The problem of "character evidence" is one of the central themes of the Federal Rules. Rule 609 represents the treatment of only one of the character issues. Another is governed by Rule 404, which attempts to resolve the even more ticklish question of when character evidence can be used to prove out of court conduct.

7. *See* Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 38 (1988). Professor Foster writes:

> Importing character evidence into the civil trial process in the form of prior convictions allows parties to accomplish through the side-door of impeachment precisely what the exclusion of character evidence as substantive proof of conduct is intended to obviate. The jury is apt to engage in a comparative moral evaluation of parties and their witnesses and, in all likelihood, will view prior convictions as revelatory of conduct. The temptation is to reward the "good" litigant with a favorable verdict, or conversely, to punish the "bad" litigant with an unfavorable verdict.

8. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1935.

9. 109 S. Ct. 1981 (1989).

10. Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).

11. Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987).

12. *See infra* note 110 and accompanying text.

basic theoretical foundations, but have cast considerable doubt on the benefits of future lower court divinings of legislative intent with respect to the Rules in general. This Note summarizes the Rule 609 controversy with an eye toward the underlying conflicts that best explain the debate, and shows why *Green* not only made imperative the Rule's amendment, but effectively reopened the philosophical issue anew.

I. Years of Indecision

Rule 609 was a creature born of legislative compromise.[13] Sewn together using disparate parts and contradictory theories,[14] it was amended, debated, given life in conference committee, and finally let loose in the courts, ultimately wreaking a sort of judicial vengeance on those unfortunate enough to have to apply it.[15]

The main source of confusion — and litigation — has been the Rule's balancing test language which provides that a conviction is admissible only if "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[16] For would-be interpreters, the ambiguity of that phrase could be summed up in three questions. First, did this judicial balancing test affect only the admissibility of a *defendant's* prior conviction, or did it affect the admissibility of *anyone's* prior conviction that might prejudice a defendant's case? Second, did the test apply to both criminal *and civil* defendants? Third, which judicial balancing test, if any, applied to prior convictions that might work to the prejudice of *other parties*, that is, the plaintiff or the government?

The first issue, by apparently wide agreement, was laid aside early. Where guilt by association is a danger, it is generally agreed that the convictions of witnesses other than the accused may be excluded.[17] Answers to the second and third issues, however, have proved to be

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13. Federal Rule of Evidence 609 has been "troublesome throughout its evolution." 10 J. Moore & H. Bendix, Moore's Federal Practice § 609.01[1.-1], at VI-98 (2d ed. 1988).

14. Professor Irving Younger wrote: "On one side were those who argued for unlimited use of convictions to impeach. On the other were those who urged strict limits. To secure the votes of both sides, something was given to each." Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 Hofstra L. Rev. 7, 11 (1976).

15. Federal Rule of Evidence 609 "has received a considerable amount of attention from the courts." R. McCullough II & J. Underwood, Civil Trial Manual 2, 622 (1980).

16. Fed. R. Evid. 609(a)(1). The balancing test does not apply to *crimen falsi*. *See supra* note 5.

17. 3 D. Louisell & C. Mueller, Federal Evidence § 316, at 326 (1979). The proposed 1990 amendment to Rule 609 changes this approach. *See infra* note 114 and accompanying text.

elusive, producing a body of case law that is at turns both groping and contradictory. Thus, when Bennie Lenard sued police, claiming to have been beaten by two officers after a drunk driving accident in 1977, the trial court excluded from evidence the fact that Lenard had been convicted of voluntary manslaughter years before. In affirming that portion of the trial court's decision,[18] the Seventh Circuit seemed to suggest in dictum that, despite the "to the defendant" language, trial judges were free to use the Rule 609(a)(1) balancing test which weighs "probative value" against "prejudicial effect" to keep out even the prior conviction of a civil plaintiff.[19]

Yet when faced with a similar problem two years later,[20] the Seventh Circuit wavered, apparently uncertain whether to follow its dictum in *Lenard*, or to opt for a new approach. One option was to hold that the Rule 609 balancing test was never meant to apply to civil cases at all, thereby making previous convictions in this setting automatically admissible under the Rule's "shall be admitted" language. A second option was to use another Federal Rule of Evidence, Rule 403, to provide the discretionary leverage necessary to keep out prior convictions when their inclusion would be unjust.[21] Unfortunately, after laying out these possibilities, the court sidestepped the debate and based its decision on other grounds.[22]

Meanwhile, the Rule 403 approach had taken hold in the Fifth Circuit, where Grady Shows had sued for injuries sustained after swinging on a "Tarzan" rope from an offshore platform to a ship. The court admitted into evidence the fact that Shows had once served time for armed robbery. After Shows lost his case and appealed, the Fifth Circuit reversed and held that the prejudicial effect of using the armed robbery conviction substantially outweighed its probative value.[23] The *Shows* court

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18. Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983).

19. *Id.* at 895.

20. Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985).

21. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

Note that Rule 403 requires that the probative value be "substantially" outweighed by prejudicial effect before it excludes evidence. Therefore, in theory, more evidence will be admitted under Rule 403 than under Rule 609's balancing test, which omits the word "substantially." G. LILLY, *supra* note 5, at 350.

22. *Christmas*, 759 F.2d at 1293. The Rule 609 issue had not been raised in the lower court, and absent a finding of "extraordinary circumstances," the Seventh Circuit declined to address the controversy.

23. Shows v. M/V Red Eagle, 695 F.2d 114 (5th Cir. 1983).

reasoned that even if the "to the defendant" balancing language of Rule 609(a)(1) did not apply to a civil plaintiff, the residual and less protective filter of Rule 403 intervenes.[24] In the Fifth Circuit's view, "Rule 403 . . . is a rule of exclusion that cuts across the rules of evidence."[25]

Nowhere was the lack of consensus about Rule 609's meaning more apparent than in the Third Circuit, where at least three different interpretations found favor with district judges at one time or another, and where the court of appeals ultimately endorsed a view that flew in the face of what other circuits had thus far concluded. In 1982, one trial court decided that Rule 609 was never meant to keep out prior convictions based on prejudice to the plaintiff.[26] The court also reasoned that Rule 403 could not be applied because its general balancing test had been preempted by the specific attention given to the problem by Rule 609.[27] A year later, a sister court, using logic similar to that of *Shows*, decided that Rule 403 could be applied to keep out prior convictions after all.[28]

The roller coaster took another dip in the influential case of *Diggs v. Lyons*.[29] Here, the Third Circuit opted for the stricter of the two interpretations and concluded that because neither Rule 609 nor Rule 403 apply in the civil context, prior convictions are always admissible against civil plaintiffs.[30] Perhaps the best indication that the debate was far from over came a year later[31] when a trial judge grudgingly applied the Circuit's new "always admissible against a civil plaintiff" standard only to openly complain in dictum that if it were up to him, Rule 609's "to the defendant" language would be interpreted as referring to the defendant in the previous conviction under consideration![32]

The *Diggs* approach to Rule 609 gained credence from three factors. First, the author of the opinion, Judge Maris, previously headed the advisory committee which originally proposed a federal code of evidence.[33]

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24. *Id.* at 119.
25. *Id.* at 118.
26. Garnett v. Kepner, 541 F. Supp. 241 (M.D. Pa. 1982).
27. *Id.* at 244.
28. Tussel v. Witco Chem. Corp., 555 F. Supp. 979 (W.D. Pa. 1983).
29. 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).
30. *Id.* at 581-82. The question of whether the balancing test applied to civil defendants as well was left unanswered.
31. Green v. Shearson Lehman/Am. Express, Inc., 625 F. Supp. 382 (E.D. Pa. 1985).
32. *Id.* at 383. No other court has adopted this view.
33. This point was not lost on the majority in Green v. Bock Laundry Mach. Co., 109 S. Ct. 1981, 1983 (1989).

Second, the Supreme Court declined to review the case.[34] Finally, in 1987, the Seventh Circuit, after its own years of indecision, endorsed a substantially identical interpretation.[35]

Despite this apparent momentum toward mandatory civil admissibility, most commentators condemned the *Diggs* construction of Rule 609. Many of the commentators either advocated the Rule 403 approach[36] or the exclusion altogether of prior conviction evidence from civil trials on the rationale that it is seldom probative of a person's veracity.[37] As a whole, the criticism was often directed at alleged defects in the *Diggs* logic or its techniques of statutory interpretation.[38] This adverse reaction might be characterized just as accurately, however, as distaste for the sort of judicial results that such a scheme would inevitably produce—a problem the *Diggs* majority itself admitted when it wrote that its interpretation "may in some cases produce unjust and even bizarre results."[39]

In a larger sense, therefore, the ostensibly technical debate over the meaning of Rule 609 concealed an underlying clash of ideologies that had as much to do with psychology and the Constitution as it did with plain meaning or congressional intent. These "ideology clashes" might best be described as follows: First, differing views of a jury's ability to fairly weigh potentially prejudicial matter; second, differing views of the relevance of felony convictions to truthfulness; and third, the traditional and ongoing tension between judicial willingness to supply a missing statutory term versus restraint. Each of these underlying conflicts will now be discussed briefly.

A. Trusting the Jury

Justice Robert Jackson once said it is a "naive assumption" to place much faith in a jury's impartiality in the face of highly prejudicial

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34. Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).

35. Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987).

36. *See, e.g.*, Note, *The Place for Prior Conviction Evidence in Civil Actions*, 86 COLUM. L. REV. 1267 (1986); Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 FORDHAM L. REV. 1063 (1986).

37. *See* Foster, *supra* note 7.

38. *See, e.g.*, Smith, *Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs*, 13 N. KY. L. REV. 441, 447-52 (1987) (*Diggs* legislative analysis does not support its interpretation); Note, *Evidence* - Diggs v. Lyons: *The Use of Prior Criminal Convictions to Impeach Credibility in Civil Actions Under Rule 609(a)*, 60 TUL. L. REV. 863, 873 (1986) (*Diggs* mistaken in its reliance upon the plain meaning of Rule 609).

39. *Diggs*, 741 F.2d at 582.

evidence.[40] To believe that jury instructions can cure that prejudice, Jackson wrote, is to believe in "unmitigated fiction."[41]

The courts which have sought to "screen" prior conviction evidence, whether by means of Rule 609 or 403, have done so with this danger firmly in mind. Thus, in *Shows*, this questioning of a personal injury plaintiff was labelled reversible error by the Fifth Circuit:

> Q. Mr. Shows, I am somewhat confused, sir. You said that you did other jobs, sandblasting jobs before this, sir?
> A. Yes, sir.
> Q. Mr. Shows, in 1979 you went to work for Coating - for Platform Coating, is that right?
> A. Yes, sir.
> Q. And you got out of prison in November of 1978, didn't you?
> MR. WALDMANN: Your Honor, I would object to any mention of that.[42]

After reviewing this exchange, the Fifth Circuit said it had been "left with the firm belief that this evidence was wafted before the jury to trigger their punitive instincts."[43] Therefore, the panel found that Rule 403 should have been used to keep out such evidence, saying its awareness of the conviction's prejudicial effect came from "the reality of the courtroom by applying rules born of experience not logic, derived intuitively and not mathematically."[44]

Just as often, however, courts in favor of screening prior conviction evidence have come to the same conclusion by engaging in exactly the sort of mathematical approach that the Fifth Circuit avoided. In *People v. Allen*, the Michigan Supreme Court prefaced discussion of its own version of Rule 609 with a detailed look at several studies of jury behavior which seemed to indicate that when a criminal defendant's prior convictions are admitted into evidence, the conviction rate substantially increases.[45] In one study, mock jurors "were willing to state that the prior conviction evidence increased the likelihood of the defendants' guilt and was the reason they found him guilty, even though they had been instructed not to use the information for that purpose."[46]

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40. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).
41. *Id.*
42. Shows v. M/V Red Eagle, 695 F.2d 114, 116 (5th Cir. 1983).
43. *Id.* at 119.
44. *Id.*
45. 429 Mich. 558, 568-69 n.8, 420 N.W.2d 499, 504-05 n.8 (1988).
46. *Id.* at 568-69 n.8, 420 N.W.2d at 505 n.8 (quoting Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 34, 44 (1985)).

Courts which rule in favor of always admitting prior convictions seem to place a greater faith in the jury's ability to evaluate a conviction for its impeachment purpose alone, disregarding any prejudicial "propensity" inference[47] that may come along for the ride. Thus, in *Garnett v. Kepner*, the court decided that it was inexcusable for the jury only to observe "[p]laintiff's youth and her subdued appearance in court" without being able to weigh against her credibility her previous convictions for several violent, but unrelated crimes.[48]

Of course, any discussion of the jury's ability to be objective in the Rule 609 context necessarily raises the question of how much information about a prior conviction should be admitted, provided the evidence is admissible in the first place. What is intriguing about this issue is that there is general agreement that the jury should hear relatively little in the way of detail.[49] At the same time, it is accepted that the trial court should retain the discretion to decide how much detail *it* needs outside the jury's hearing to perform its initial balancing on the question of admissibility in the first place.[50] This suggests two criticisms. First, it is likely that a manslaughter conviction admitted as evidence when potentially mitigating details are not known will have a greater prejudicial effect on a jury than when they are known — an unfair result.[51] Second, there does not seem to be a logical distinction between the jury's presumed trustworthiness in weighing the raw fact of a prior conviction, on the one hand, and the inherent suspicion of a jury's ability to fairly weigh the details and circumstances of a prior conviction, on the other.

B. Differing Views of Relevance

Tacit in any use of a prior felony conviction to impeach the credibility of a witness at trial is the supposition that criminal history has a bearing

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47. *See supra* the quotation in note 7.

48. Garnett v. Kepner, 541 F. Supp. 241, 245 (M.D. Pa. 1982).

49. *See* United States v. Gordon, 780 F.2d 1165, 1175-76 (5th Cir. 1986) (trial judge can bar defendant from inquiring into details of government witness's prior convictions).

50. In United States v. Lipscomb, 702 F.2d 1049, 1076 (D.C. Cir. 1983) (quoting United States v. Boyer, 150 F.2d 595, 596 (D.C. Cir. 1945)), the following approach was endorsed:

> It is generally agreed that in order to save time and avoid confusion of issues, inquiry into a previous crime must be stopped before its logical possibilities are exhausted; the witness cannot call other witnesses to corroborate his story and the opposing party cannot call other witnesses to refute it. The disputed question is whether inquiry into a previous crime should stop (1) with proof of the conviction of the witness or (2) with any reasonably brief "protestations on his own behalf" which he may wish to make. The second alternative will seldom be materially more confusing or time-consuming than the first.

51. Conversely, it can be argued that where facts that *enhance* the severity of a crime are not known to the jury, the impeachment effect is shortchanged.

on truthfulness.[52] The Rule 609 approach is to divide crimes into two categories. The first category includes those crimes that implicitly reflect on "honesty and veracity," the so-called *crimen falsi*.[53] The second category, as set out by Rule 609, includes all other types of serious convictions.[54] Those who helped draft the Rule considered these latter crimes relevant to credibility because they demonstrate "a willingness to engage in conduct which entails substantial injury to and disregard of the rights of other persons or to the public."[55] In the last analysis, however, the two classifications of convictions are theoretically relevant at trial for identical reasons. Each classification makes it more likely that the person on the stand is lying.

That is where the logic breaks down. While ascribing the same philosophical base to the two categories, Rule 609 then proceeds to afford them conflicting treatment: 609(a)(2), which governs *crimen falsi*, contains no provision for any judicial discretion at all, thus making such crimes mandatorily admissible in all situations,[56] while 609(a)(1) applies a probative value versus prejudicial effect balancing test at least as to the accused in a criminal trial.[57] Inferentially, therefore, Rule 609 seems to say there exists no circumstance in which a "crime of dishonesty" can be more prejudicial than probative, a questionable proposition. At the same time, Rule 609 assigns all other felonies to a secondary tier where judicial balancing in some fashion *is* necessary for justice's sake. Add to the equation the significant difficulty of separating exactly which crimes fall into which categories[58] and the court's dilemma is fully revealed: interpreting Rule 609 is not a matter of looking for a root philosophy, but choosing one. It all depends on how the analyst connects, if at all, prior convictions to telling the truth.

C. Supplying the Missing Term

Because Rule 609 by its terms "cannot be sensibly applied in civil cases,"[59] courts interested in solving the problem have been forced to

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52. *See* Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987). "[T]hat crookedness and lying are correlated is the premise of Rule 609(a) . . . ." *Id.*

53. 10 J. Moore & H. Bendix, *supra* note 13, § 609.01[1.-7], at VI-111 (quoting 1971 Dept. of Justice analysis).

54. *See supra* notes 4-5.

55. 10 J. Moore & H. Bendix, *supra* note 13, § 609.01[1.-7], at VI-111.

56. It has taken judicial interpretation to reach this conclusion, but the view is unanimous. For an interesting example of how this issue has been approached by the courts, see United States v. Kuecker, 740 F.2d 496 (7th Cir. 1984) (mail fraud conviction mandatorily admissible under 609(a)(2)).

57. Whether the test applies further than that is the subject of this Note.

58. *See* D. Louisell & C. Mueller, *supra* note 17, § 314, at 296-99, concerning disagreement in Congress over which crimes inherently show dishonesty.

59. 10 J. Moore & H. Bendix, *supra* note 13, § 609.14[4], at VI-148.

choose between supplying what should have been included, had Congress thought about it, and extrapolating a term from some specific or even general congressional intent in the matter. In some of the most influential cases, however, the courts intentionally chose to do nothing at all. The message to Congress in these cases seems to be that if the mess is to be cleaned up, the legislative branch will have to wield the mop.

In the ongoing Rule 609 debate, advocates of these views, which perhaps can be labelled rather loosely as the "judicial activism" and "judicial restraint" positions, have repeatedly confronted each other across the divides separating majority and dissenting opinions. Most notably, in the important case of *Diggs v. Lyons*,[60] the majority concluded that despite Rule 609's shortcomings in the civil litigation arena, it was simply not the judiciary's role to intervene:

> [I]f the rule is to be amended to eliminate these possibilities of injustice, it must be done by those who have the authority to amend the rules, the Supreme Court and the Congress. We, therefore, leave the problem to them. It is not for us as enforcers of the rule to amend it under the guise of construing it.[61]

In response, the dissenting judge in *Diggs* complained that the only reason Rule 609 did not work in the civil context was because of "a legislative oversight as to the legislation's effect upon civil plaintiffs."[62] Concluding that the judicial extension of the Rule's balancing test to civil litigants was reasonable under such circumstances, the dissent argued that courts should supply missing statutory terms as a matter of expediency, if nothing else, and that in any case, "[n]o matter which way these ambiguous rules are interpreted, Congress is free to change the interpretation by legislation."[63]

Interestingly, the "activism" and "restraint" positions, at least to the extent that they bear on the interpretation of Rule 609, are by no means aligned with one view of the Rule or another. Probably the best illustration of this is the Seventh Circuit decision in *Campbell v. Greer*.[64] Although in result it appears to be a duplicate of the *Diggs* interpretation, its language is exactly the opposite. The antibalancing test majority can be seen suggesting that Rule 609 "needs some judicial patchwork,"[65] even as the probalancing test concurrence argues for restraint by complaining that the majority's activism is "erroneous dictum" and "un-

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60. 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).
61. *Id.* at 582.
62. *Id.* at 583 (Gibbons, J., dissenting).
63. *Id.*
64. 831 F.2d 700 (7th Cir. 1987).
65. *Id.* at 703.

necessary to the decision in this case."[66] One possible conclusion is that the ideological clash over the proper role of the courts is at least partly an artifice concealing what simply may be judicial interest in bringing about particular results in isolated cases.

II. *Green v. Bock Laundry Machine Co.*

The seeming momentum of the Third Circuit's "always admissible against a civil plaintiff" standard was finally put to the test in the Supreme Court's decision in *Green v. Bock Laundry Machine Co.*,[67] in which work release prisoner Paul Green argued that his product liability claim against a car wash equipment manufacturer had not been fairly heard. Green had lost his right arm after he reached inside an industrial-sized dryer. The manufacturer used Green's burglary convictions to impeach his credibility.

A. Majority

In the majority opinion delivered by Justice Stevens, the Court affirmed the Third Circuit approach and took the *Diggs* interpretation of Rule 609 a step further.[68] In effect, *Green* says *all* prior convictions except those that adversely affect a criminal defendant are mandatorily admissible; that is, judges have no discretion to weigh the prejudice of prior convictions against civil plaintiffs, civil defendants, or the government in criminal cases.[69] The Court reached this conclusion after subjecting Rule 609 to what by then had become a rather familiar battery of inquiries for those acquainted with the long controversy: a querulous examination of the Rule's plain meaning, or lack thereof;[70] a detailed, but somewhat fruitless tour of the Rule's legislative history and common law basis;[71] culminating in a sort of combination of the two methods, an attempt to derive legislative intent from the Rule's structure and interrelationship with Rule 403.[72]

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66. *Id.* at 708-09 (Will, J., concurring).

67. 109 S. Ct. 1981 (1989).

68. 741 F.2d 577 (3d. Cir. 1984). *Diggs* held that automatic admissibility should apply to civil plaintiffs. *Id.* at 582. The question of civil defendants was not explicitly addressed.

69. 109 S.Ct. at 1993-94. A limitation with continuing vitality in criminal cases, affecting both the government and defense alike, exists where use of such a conviction would have a prejudicial effect on a criminal defendant through guilt by association. *See supra* note 17 and accompanying text.

70. *Green*, 109 S. Ct. at 1984-85.

71. *Id.* at 1985-90.

72. *Id.* at 1992-93.

This synthesis of methods is the fresh coat of paint that the Court applies to the *Diggs* rationale. The majority's argument is that Rule 609's silence on the civil admissibility question should be interpreted not to mean that Congress was sloppy and forgot to deal with the problem, but instead, that Congress specifically wanted to leave in place the common law rule favoring mandatory admissibility of prior convictions in civil trials.[73] In the majority's words, "[t]he unsubstantiated assumption that legislative oversight produced Rule 609(a)(1)'s ambiguity respecting civil trials hardly demonstrates that Congress intended silently to overhaul the law of impeachment in the civil context."[74] Even if this was not what Congress had in mind, the majority reasoned that those "contending that legislative action changed settled law [have] the burden of showing that the legislature intended such a change."[75] The Court's conclusion, contrary to the view of most critics, was that this burden had not been met.

Moreover, in arriving at the opposite conclusion that Congress had left a hole in Rule 609 as a result of "deliberation, not oversight,"[76] the Court identified what it considered an important clue: the fact that the undisputed provision within the second part of Rule 609, the one dealing with obvious crimes of dishonesty, or *crimen falsi*,[77] had without question been designed with mandatory admissibility in mind, and therefore demonstrated congressional attention to exactly the sort of issue critics claimed had not been addressed. The majority's apparent chain of reasoning was this: First, everyone agrees that no judicial balancing test applies to prior *crimen falsi* such as perjury under Rule 609, and those crimes must always be admitted into evidence;[78] second, everyone agrees that the "residual" balancing test in Rule 403 should not be used to keep out crimes of dishonesty, regardless of their prejudicial effect;[79] third, and as a result of this reasoning, Congress gave Rule 609 what amounts to exclusivity in the "impeachment by prior conviction" realm.[80] Factor in the various balancing tests expressly included in Rule 609 that also preempt Rule 403, namely in the field of criminal defendants,[81]

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73. Exactly how this "common law rule" works and whether it can be summed up quite so easily is a subject of doubt.

74. *Green*, 109 S. Ct. at 1991.

75. *Id.*

76. *Id.*

77. FED. R. EVID. 609(a)(2). *See supra* note 4.

78. *Green*, 109 S.Ct. at 1983.

79. *Id.*

80. *Id.*

81. FED. R. EVID. 609(a)(1). This section of the rule applies a balancing test to criminal defendants. Whether it goes further than that is the subject of this Note. *See supra* note 4.

juvenile cases,[82] and older crimes,[83] and the argument gains weight. What the majority is saying is that it simply does not make sense to let Rule 609 balancing defeat Rule 403 balancing in every context but one. The implication that follows, according to the Court, is that had members of Congress wanted to change the protections affecting the civil use of prior convictions, they would have included a provision on that point and "they could have done so easily."[84]

As straightforward as the majority's logic appears to be, vestiges of the same underlying philosophical concerns that circumscribe previous judicial attempts to come to terms with Rule 609 lurk along the way. Early on, the majority inserts a boilerplate disclaimer which in timeworn style sets forth the "judicial restraint" position that the Court's task "is not to fashion the rule we deem desirable but to identify the rule that Congress fashioned."[85] The Court looks askance at the "[p]rodigious scholarship highlighting the irrationality and unfairness" of the Rule's inherent linkage of prior felony convictions to witness truthfulness and, while acknowledging the possibility that this criticism may have merit, shrugs it off because Congress may have "intended otherwise."[86] In other words, the majority's approach to Rule 609, like that of other courts, may be rooted not only in what the Rule says, but in a basic, and sometimes unspoken, philosophical agenda.

B. Dissent

If the *Green* majority is the standard-bearer for the judicial restraint philosophy, supported by a technical analysis that attempts to find congressional deliberation in the face of apparent ambiguity, Justice Blackmun's dissenting opinion is its opposite. Justice Blackmun promotes

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82. FED. R. EVID. 609(d). This section of the rule provides:

Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

83. FED. R. EVID. 609(b). The pertinent part of this section of the rule provides:

Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

84. *Green*, 109 S. Ct. at 1991.

85. *Id.* at 1984.

86. *Id.* at 1992.

judicial activism to respond to the "irrationality and unfairness" protestations the majority acknowledged and chose to ignore.[87] Practically speaking, however, the dissent's method is the same: cloaking whatever philosophical predispositions it may have in the hallowed language of statutory interpretation. Where the majority implies deliberation, the dissent sees only "slipshod drafting" by a conference committee which did not possess "clarity of language" as a virtue.[88] The dissent's argument is that the shards of congressional history cited by the majority and so repeatedly exhumed, classified and put back together by lower courts only demonstrate "why almost all that history is entitled to very little weight."[89]

Nevertheless, as if reconciling itself to an unavoidable evil, the dissent promptly engages in the very practice it has just devalued, piecing together the fragments once again, this time not in search of specific statutory intent, but instead to find an overall congressional "preference." What the dissent concludes is that Congress generally was in favor of "judicial balancing whenever there is a chance that justice shall be denied a party because of the unduly prejudicial nature of a witness' past conviction for a crime that has no direct bearing on the witness' truthfulness."[90] As the dissenting opinion purports to restate it, Congress actually meant prejudice to a party when it said "prejudice to the defendant" in Rule 609.[91] Interestingly, the dissent's view is identical to the Seventh Circuit's early dictum in *Lenard v. Argento*[92] which the same court later rejected[93] and which seemed to suggest that the Rule 609(a)(1) balancing test, despite its defense orientation, should be applied to any party whose case was prejudiced by the use of prior conviction evidence — prosecutor included.

The final prong of the dissent's position is what amounts to a claim of false advertising. The dissent complains that the plain language of Rule 609 encourages unsuspecting lawyers representing civil defendants to put their clients on the stand in the belief that the judge has discretion to keep out prior conviction evidence, when the *Green* majority in fact gives judges no such flexibility. The argument is that the Rule's interpretation at least ought to reflect what the Rule itself promotes. This argument loses force when one considers the widespread availability and

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87. *Id.* at 1995 (Blackmun, J., dissenting) (quoting *id.* at 1992).

88. *Id.* at 1991.

89. *Id.*

90. *Id.* at 1996-97 (Blackmun, J., dissenting).

91. *Id.* at 1997.

92. 699 F.2d 874 (7th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983). *See supra* notes 18-22 and accompanying text.

93. Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987).

use of manuals interpreting the Federal Rules of Evidence in light of the most recent decisions.[94]

C. Scalia's Bone of Contention

Nearly every judicial interpretation of Rule 609 has inevitably traced its reasoning to the array of committee reports, testimony, and floor debates that accompanied the Rule's adoption. Although the odd paucity of meaningful, on-the-record legislative discussion about Rule 609's application to civil trials has created considerable frustration, this problem seems to have been taken up by each succeeding group of judges as a sort of challenge to their moxie as statutory detectives. Thus, the opinions preceding *Green*, with the *Green* majority and dissenting opinions certainly not excluded, have literally stretched the traditional process of legislative extrapolation, with all its convenient fictions, virtually to the breaking point.

It was perhaps only a matter of time before someone seriously questioned this, and Justice Antonin Scalia, who even years before his appointment to the Supreme Court had been among conservatives mounting a vigorous campaign against the alleged illegitimacy of committee reports as primary authority,[95] was an obvious candidate to take hold of the opportunity.[96] In his concurring opinion in *Green*,[97] Justice Scalia endorsed the majority's decision favoring mandatory civil admissibility of prior convictions, while decrying the analytical method used to reach it. To Justice Scalia, the majority's painstaking analysis of the Rule's

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94. The annually published MOORE'S FEDERAL PRACTICE RULES PAMPHLET is an example.

95. A sampling of then-Judge Scalia's activism can be found in a 1985 news account:

> Scalia Questions Routine Deference To Hill Report
>
> Washington - Federal courts should reconsider "routine deference" to the legislative history contained in congressional committee reports when they interpret statutes, Judge Antonin Scalia of the U.S. Circuit Court of Appeals here contended in a recent opinion.
>
> "I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill," wrote the judge, who often is mentioned as a potential Reagan nominee to the Supreme Court.

The Nat'l L. J., Dec. 9, 1985, at 5, col. 1.

96. Interestingly, a foreshadowing of this argument can be found in the dissent to *Diggs*, in which Judge Gibbons criticizes the undue emphasis given to "snippets of legislative history" involving only four members of Congress. 741 F.2d at 583. Judge Gibbons, however, reaches an opposite conclusion from Justice Scalia on the construction of Rule 609. *See id.*

97. 109 S. Ct. at 1994 (Scalia, J., concurring).

evolution from early versions and case law through committee reports and "the so-called floor debates"[98] to its eventual adoption was a largely irrelevant exercise:

> The meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated - a compatibility which, by a benign fiction, we assume Congress always has in mind.[99]

Justice Scalia's argument is compelling, but his recipe for statutory construction is at odds with American judicial orthodoxy. Although the interpretation of statutes is not a science of precision, with differing schools of thought maintaining comparable claims to legitimacy,[100] the Scalia approach does not fit easily within any of them. For instance, it does not comport with what statutory scholar Guido Calabresi and others have labelled "the plain-meaning" school of interpretation,[101] which argues that legislative purpose is only relevant when a statute is ambiguous. That Rule 609 is at least *contextually* ambiguous is hard to question,[102] and therefore, appears to make the scant legislative materials under this approach more valuable, not less.

Nor does Scalia's view comport with long-established federal precedent in favor of the traditional "original legislative intent" model of interpretation.[103] Not only is it widely accepted that the official legislative histories, including reports of standing committees, are integral to statutory construction,[104] but courts have also made it clear that statutory

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98. *Id.*

99. *Id.* (emphasis in original).

100. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 214 n.30 (1982). Calabresi writes that "[t]here is no consensus on what courts should be doing when they interpret statutes." *Id.*

101. *Id.*

102. In other words, although the plain language of Rule 609 does not plausibly lend itself to more than one meaning, that one meaning just does not make sense when viewed as part of the larger context of the Federal Rules specifically and evidence philosophy in general.

103. *Id.*

104. 2A J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.06 (4th ed. 1984). This view, not too coincidentally, has gone hand in hand with efforts by legislative staff members to upgrade the preparation of committee reports.

ambiguity is not a prerequisite to the use of such materials. One court has declared that "the plain meaning rule . . . is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files."[105] Thus, the weakness of the Scalia doctrine, if it can be called that, is that it stands by itself philosophically.

On the other hand, the obvious strength of the Scalia doctrine is that it comes from a certain common sense, "emperor has no clothes" skepticism that in Rule 609 may have found the perfect foil. Despite what the theories of legislative interpretation might say, it is all too easy to stand back from the Rule, look at the confusion surrounding its enactment,[106] and as a consequence dismiss the various judicial attempts to reconstruct "what Congress intended" as cardboard fictions. Even if one does not accept the entire philosophy that Justice Scalia recommends as an alternative, it is difficult to avoid the correctness of his main observation that the committee histories in this particular case arguably do not tell anything about congressional intent. If nothing else, Justice Scalia may have advanced the Rule 609 discussion and future discussions like it by clearing away all the interpretive chaff and reducing the civil side of the Rule to its rightful status and lineage: legislative orphan.

III. The New Rule 609

A. The Inevitability of Repair

Green stands at the top of a body of decisional law that is something of a monument to shortsighted legislative draftmanship. It is as if years ago the authors of Rule 609 had posed a complex mathematical question, unaware that those who followed would go to considerable trouble and expense working through its calculations to reach varying results. To add insult to injury, when the final authority spoke, the "answer" was completely unacceptable — something on the order of $2 + 2 = 5$. In other words, what *Green* provides, mandatory admissibility, is obviously not a permanent solution. It was obvious even before the Supreme Court spoke that a new Rule 609 would have to be devised to prevent the sort of difficulties that the *Diggs* court unabashedly predicted when it spoke of "unjust and even bizarre results."[107]

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105. *Id.* at § 48.01 (quoting FCC v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957)).

106. In a year in which the Federal Rules of Evidence, including Rule 609, were undergoing almost constant change, one wag's remarks were worth repeating: "The ones I feel sorry for are the ones who paid $150 for the cassette tapes explaining the Federal Rules of Evidence." J. Estes, *The New Federal Rules of Evidence*, 65 F.R.D. 267, 267 (1974).

107. 741 F.2d at 582.

This transient state of affairs was recognized by the *Green* dissent, which suggested that the Court pursue only the limited goal of preventing "unjust results until Rule 609(a) is repaired, as it must be."[108] Still, with all the litigation caused by the Rule's ambiguity over the years, it seems odd that amendment has not occurred before. Even in the first heady moments following the Federal Rules' adoption, Professor Irving Younger was writing that the Rules were "in principle necessary and splendid, in execution something deficient; this many excellences tempered by that many failures; thick with good things but full of infelicities and mistakes. All, someday, will doubtless be corrected and made perfect."[109] Yet revisions to the Rules have been slow in coming. With respect to Rule 609, the wait has been particularly long and frustrating.

B. The Proposed Change

On January 26, 1990, the Supreme Court submitted to Congress a proposed amendment to Rule 609(a) drafted by the Judicial Conference of the United States.[110] Unless Congress acts otherwise, this amendment will become effective December 1, 1990.[111]

The new Rule clears up the balancing test versus mandatory admissibility conflict by expressly providing for Rule 403 balancing of conviction evidence offered to impeach the testimony of a witness other than a criminal defendant. This is the approach recommended by most commentators[112] and notably by the Fifth Circuit in *Shows*.[113] An interesting offshoot of the new Rule's wording is that it eliminates the special protections which federal case law extended to criminal defense witnesses other than the accused. In other words, although criminal

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108. 109 S. Ct. at 1995 (Blackmun, J., dissenting).

109. Younger, *supra* note 14, at 7.

110. Proposed Rule 609(a) reads in pertinent part:

> (a) General rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

110 S. Ct. No. 9 CXXXI (Mar. 1, 1990).

111. The Judicial Conference of the United States suggests rule changes, which, if sent to Congress by the Supreme Court, become law unless vetoed or modified by Congress. *See* 28 U.S.C.A. §§ 331 (West 1968 & West Supp. 1990), 2072-74 (West Supp. 1990).

112. *See supra* note 36.

113. 695 F.2d 114. *See supra* note 23 and accompanying text.

defense witnesses previously found themselves protected by the same strict balancing test contained in Rule 609 that covered the accused,[114] under the new Rule evidence used to impeach such witnesses will be filtered through the less stringent Rule 403 instead.[115]

While this likely amendment takes a big step toward correcting Rule 609's deficiencies, it does not go far enough. A better proposal comes from a committee of the American Bar Association.[116] Its proposal eliminates the current Rule's much litigated phrase, "to the defendant," and therefore has the practical effect of applying the current, stricter Rule 609 balancing test to all witnesses. This is the approach of the *Green* dissent.[117] The ABA proposal then goes further to subject prior *crimen falsi* convictions to a balancing test of their own which is similar to the language of Rule 403.[118] Such a balancing test has the virtue of eliminating the logical inconsistency of both the current Rule and its probable successor, the proposed amendment by the Supreme Court, under which there is no such thing as an overly prejudicial *crimen falsi* conviction offered up for the consideration of the jury. The ABA approach, therefore, is less "tilted" toward the admissibility of prior convictions in general and represents a welcome and much more coherent alternative evidentiary philosophy that up till now could be described best as "legislate first, ask questions later."

Which is, of course, the problem. What has made amending the Rule so difficult is that there has been no consensual foundation upon which to build. To begin with, any reconsideration of the issue of impeachment by prior conviction has quickly found itself at a philo-

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114. *See supra* note 17 and accompanying text.

115. A further change made by the new Rule is an elimination of the requirement that the conviction may only be elicited during cross-examination, "a limitation that virtually every circuit has found to be inapplicable" anyway. Committee Note, 110 S. Ct. No. 9 CXXXIV (March 1, 1990).

116. ABA Comm. on Rules of Criminal Procedure and Evidence, *Federal Rules of Evidence: A Fresh Review and Evaluation*, 120 F.R.D. 299, 356 (1987). The proposed revision states in pertinent part:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect; or (2) involved untruthfulness or falsification, regardless of the punishment, unless the court determines that the probative value of admitting this evidence is substantially outweighed by the danger of unfair prejudice.

117. 109 S.Ct. at 1995 (Blackmun, J., dissenting). *See supra* note 91 and accompanying text.

118. FED. R. EVID. 403. To compare the language of Rule 403 with the language of the proposed amendment, see *supra* notes 21 and 116 respectively.

sophical fork in the road which points to judicial discretion in one direction and mandatory admission in the other. Regardless of the fork taken, there is no completely safe route. An arbitrary rule cannot yield to the unusual case, and discretion breeds inconsistency.[119]

Additionally, the guidance that sometimes is offered by general legal trends is lacking in this context. There is no trend. In 1942, Dean Mason Ladd, in an article about the Model Code of Evidence, wrote that the code "takes the modern step of abolishing conviction of a crime to impeach credibility except as to those crimes involving dishonesty and false statement."[120] If such is "the modern step," what accounts for *Green*?

To properly amend or replace Rule 609 outright, the drafters will have to do something that arguably was neglected the first time around. They must think through exactly what it is they believe. This process must start with the Rule's basic purpose, a scrutiny which should, at a minimum, acknowledge all fictions for what they are,[121] and either eliminate them or decide that they must be lived with.

Furthermore, in choosing a philosophy, and thus a Rule, treacherous political waters inevitably must be navigated. Among the problems is the fact that so many of the cases in which the current Rule has proved troublesome are section 1983 cases.[122] Many of the civil plaintiffs who alleged that the use of their criminal records at trial constituted an injustice are not traditional personal injury victims but prison inmates[123] or others involved in confrontations with police.[124] From this perspective the "civil context" which is inadequately handled by Rule 609 can be

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119. *See* G. Lilly, *supra* note 5, at 351.

120. Ladd, *A Modern Code of Evidence*, MODEL CODE OF EVIDENCE 327, 341 (1942).

121. Consider the comments of Dean Griswold, as presented by Senator Hart during the Senate debate of Rule 609:

> We accept much self-deception on this. We say that the evidence of the prior convictions is admissible only to impeach the defendant's testimony, and not as evidence of the prior crimes themselves. Juries are solemnly instructed to this effect. Is there anyone who doubts what the effect of this evidence in fact is on the jury? If we know so clearly what we are actually doing, why do we pretend that we are not doing what we clearly are doing?

3 D. LOUISELL & C. MUELLER, *supra* note 17, § 314, at 301-02 (1979) (quoting 120 CONG. REC. 37078-79 (1974) (statement of Sen. Hart quoting Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965))).

122. 42 U.S.C. § 1983 (1982) (recovery for damages against a person acting under color of state law who deprives another of a constitutional right).

123. *See, e.g.*, Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987); Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985); Garnett v. Kepner, 541 F. Supp. 241 (M.D. Pa. 1982).

124. *See, e.g.*, Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985); Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983); Howard v. Gonzales, 658 F.2d 352 (5th Cir. 1981).

viewed as a quasi-criminal one. That more civil plaintiffs are not politically appealing is due to the reality that "conventional" civil litigation simply does not present the prior conviction evidentiary problem very often.[125] So the danger always exists that substantive philosophical consideration of Rule 609 may either be tainted or kept on the back burner by narrow characterization of the problem as a prisoners' rights issue.

If there is a common thread which runs through the probable 1990 amendment to Rule 609,[126] its ABA rival,[127] and indeed through the writings of nearly all recent commentators who have studied the subject,[128] it is the belief that judicial control of some kind should be required over the admissibility of the prior convictions of witnesses based on that evidence's effect on civil plaintiffs, civil defendants, and even the government in criminal cases.[129] It is no coincidence that this is so. As both the ABA and the Judicial Conference have implicitly recognized, a new "judicial discretion" version of Rule 609 is needed, if for no other reason than to reintroduce into the evidentiary process the fundamental concern embodied by a rather basic federal rule that is not discussed much in the cases:[130] Rule 401, which defines the concept of "relevant evidence."[131]

At the least, a new Rule 609 should provide judges with a way to keep out prior convictions which have no obvious relevance to the issue at hand. Balancing tests are nothing but specific applications of this idea. As things stand now in the shadow of *Green*, Rule 609 is unjust and its likely successor, the Supreme Court's proposed amendment, while an improvement, does not do enough to correct the Rule's philosophical frailty.

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125. D. LOUISELL & C. MUELLER, *supra* note 117, § 316, at 324 n.26.

126. *See supra* note 110.

127. *See supra* note 116.

128. *See supra* note 36.

129. For a third alternative, see the Michigan Supreme Court's revision of Michigan Rule of Evidence 609 in People v. Allen, 429 Mich. 558, 614, 420 N.W.2d 499, 525-26 (1988). It is an intriguing blend of discretionary approaches which also attempts to define the factors a trial judge should consider in deciding whether prior conviction evidence is probative.

130. For an exception, see Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 984 n.13 (W.D. Pa. 1983).

131. FED. R. EVID. 401. This rule provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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Summary Jury Trials: A "Settlement Technique" That Places a Shroud of Secrecy on Our Courtrooms?

First amendment questions rarely fail to provoke lively debate. In the context of this Note, the first amendment right of public access to judicial proceedings is pitted against the judicial interest in fostering pretrial settlement. The implications are profound.

Ever-increasing caseloads and the high cost of litigation[1] have led the federal judiciary, as well as the legislature, to promote alternate methods of dispute resolution.[2] In 1982, Chief Justice Warren Burger, in an effort to alleviate the problem with overloaded court dockets, urged the creation of new dispute resolution tools by using "the inventiveness, the ingenuity and the resourcefulness that have long characterized the American business and legal community."[3] The following year, the Chief Justice again emphasized the need to alleviate overcrowded dockets and recognized that "[f]ederal and state judges throughout the country are trying new approaches to discovery, settlement negotiations, trial and alternatives to trial that deserve commendation and support."[4] Alternate dispute resolution (ADR) has evolved into a broad range of options[5] which operate in the interest of saving time and costs by encouraging settlement.

At the cutting edge of this ADR movement is an innovative procedure known as the summary jury trial, which was developed in 1980 by United

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1. *But cf.* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983) (argues that America has not really experienced a "litigation explosion").

2. In 1980, Congress enacted legislation encouraging state and local agencies to establish forums providing for arbitration, mediation, conciliation and other similar procedures for settling disputes outside traditional court-based methods. Dispute Resolution Act, 28 U.S.C.S. App. II (1980).

3. Burger, *1982 Year-End Report on the Judiciary*, *quoted in* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 465 (1984).

4. Burger, *1983 Year-End Report on the Judiciary*, *quoted in* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 465 (1984).

5. Some alternative methods of dispute resolution include arbitration, negotiation, conciliation, mediation, minitrial (or miniarbitration), special masters (neutral experts), rent-a-judge, ombudsman and summary jury trial. *See generally* W. Brazil, Effective Approaches to Settlement: A Handbook for Lawyers and Judges (1988); E. Goldberg, E. Green, and F. Sander, Dispute Resolution (1985); Am. Jur. 2d *New Topic Service, Alternate Dispute Resolution* (1985).

States District Court Judge Thomas D. Lambros.[6] The summary jury trial is a court-annexed trial procedure used to facilitate settlement in cases where traditional settlement negotiations have been unsuccessful. Most of the formalities of an actual trial are present; a judge presides and a jury returns a non-binding verdict. The summary jury trial has been referred to metaphorically as a "looking glass"[7] through which litigants can view the strengths and weaknesses of their case in order to make wise decisions regarding settlement. The procedure has been well received as an efficient alternative to lengthy trials.[8]

Still less than a decade old, the summary jury trial is beginning to experience growing pains. In 1984, three public utilities filed a lawsuit in the United States District Court for the Southern District of Ohio against General Electric Company and an architectural and engineering firm.[9] The case, which involved the design and construction of a nuclear power plant owned by the utilities, aroused a great deal of public interest. When the district court ordered the parties to participate in a summary jury trial and closed the proceeding to the press and public, three Ohio newspapers moved to intervene to challenge the unilateral closure by asserting their first amendment right of access to judicial proceedings. The district court judge held that the qualified first amendment right of access "does not attach to this summary jury trial,"[10] and the Sixth Circuit affirmed the trial court's decision.[11]

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6. *See generally* Brenneman and Wesoloski, *Blueprint for a Summary Jury Trial*, MICH. B.J. 890 (Sept. 1986); Gwin, *Summary Jury Trial: An Explanation and Analysis*, 52 KY. BENCH & B. 16 (Winter 1988); Hittner, *The Summary Jury Trial*, 51 TEXAS B.J. 40 (1988); Jackson, *Alternative Dispute Resolution: Nonbinding Summary Jury Trials*, 6 LITIG. NEWS 5 (April 1981); Lambros, *The Summary Jury Trial — An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (Feb. 1986) [hereinafter Lambros, *Summary Jury Trial*]; Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984) [hereinafter Lambros, *A Report*]; Lambros and Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); Marcotte, *Summary Jury Trials Touted*, A.B.A. J. 27 (April 1, 1987); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986); Rieders, *Summary Jury Trials*, 23 TRIAL 93 (1987); Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986).

7. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 599 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989).

8. *Cf.* Posner, *supra* note 6.

9. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989). *See generally* Note, *Cincinnati Gas & Elec. Co. v. General Elec. Co.: Extinguishing the Light on Summary Jury Trials*, 49 OHIO ST. L.J. 1453 (1989); Note, *Summary Jury Trials: Should the Public Have Access?*, 16 FLA. ST. U.L. REV. 1069 (1989).

10. *General Elec.*, 117 F.R.D. at 602.

11. *General Elec.*, 854 F.2d 900 (6th Cir. 1988).

General Electric was a case of first impression as it relates to the first amendment right of access to summary jury trials. This Note examines the development of summary jury trials, as well as the dichotomy of the summary jury trial label — "settlement technique" v. "judicial proceeding." It analyzes *General Electric*, and explores the historical basis for the public's right of access to judicial proceedings, arguing that the nature of the summary jury "hybrid" procedure mandates a qualified first amendment right of access.

I. The Summary Jury Trial

A. History

After having presided over two personal injury suits he felt should have been settled prior to trial,[12] Judge Lambros, the brain trust behind this innovative procedure, conducted the first summary jury trial on March 5, 1980.[13] The case had not settled because "counsel and their clients felt that they could obtain a better resolution from a jury than from their pretrial settlement negotiations."[14] Lambros surmised that:

> [I]f only the parties could gaze into a crystal ball and be able to predict, with a reasonable amount of certainty, what a jury *would* do in their respective cases, the parties and counsel would be more willing to reach a settlement rather than going through the expense and aggravation of a full jury trial.[15]

Hence, the summary jury trial was conceived.

Judge Lambros determined that use of the summary jury trial "is firmly rooted in the Federal Rules of Civil Procedure."[16] According to Lambros, the combination of Rule 1, which states that the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action," and the "broad pretrial management provisions of Rule 16" act together with the court's inherent power to manage and control its docket to provide authority for assigning a case to summary jury trial.[17] More particularly, Rule 16(a) provides that "the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or

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12. Lambros, *A Report*, *supra* note 6, at 463.
13. Lambros and Shunk, *supra* note 6, at 43 n.1.
14. *Id.*
15. *Id.* (emphasis in original).
16. *Id.* at 469.
17. Lambros, *Summary Jury Trial*, *supra* note 6, at 287; Lambros, *A Report*, *supra* note 6, at 469.

conferences before trial for such purposes as (1) expediting the disposition of the action . . . and (5) facilitating the settlement of the case."[18] Rule 16(c)(7) and (11) state that "participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . and (11) such other matters as may aid in the disposition of the action."[19] Furthermore, Judge Lambros pointed out that Rule 39(c)[20] provides for the use of an advisory jury.[21]

At least one commentator believes that Rule 16 does *not* provide an adequate basis for authority to assign a case to summary jury trial. Judge Posner of the U.S. Court of Appeals for the Seventh Circuit stated that "[a]ll the [Rule 16(c)(7)] subsection appears to require or authorize, so far as is relevant here, is the discussion (not implementation) at the pretrial conference of *extrajudicial* proceedings — which summary jury trial is not."[22] Judge Posner also said that a summary jury is outside the scope of Rule 39(c).[23]

Nevertheless, the use of summary jury trials has flourished since its introduction in 1980. Many federal district court rules expressly authorize summary jury trials.[24] In 1984, the Judicial Conference of the United States endorsed "the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases," as did Chief Justice Burger in his 1984 Year-End Report to the Judiciary.[25] At least 65 federal courts

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18. FED. R. CIV. P. 16(a)(1) and (5). *See* Lambros, *A Report*, *supra* note 6, at 469.

19. FED. R. CIV. P. 16(c)(7) and (11). *See* Lambros, *A Report*, *supra* note 6, at 469.

20. Rule 39(c) provides that "[i]n all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury." FED. R. CIV. P. 39(c).

21. Lambros, *A Report*, *supra* note 6, at 470. *See* Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363, 1368 n.44 (1987) ("The use of the advisory jury as authority for the summary jury trial is particularly apt because the power to call an advisory jury under Rule 39(c) has been interpreted broadly.").

22. Posner, *supra* note 6, at 385 (emphasis in original).

23. *Id.* ("[T]he summary jury is not an advisory jury. It does not advise the jury how to decide the case, but is used to push the parties to settle."). Judge Posner also pointed out that Rule 39(c) allows the district court to use an advisory jury "in all actions not triable of right by a jury," which would seem to exclude summary jury trials because they are used in actions that are triable of right by jury. *Id.* at n.27.

24. *See, e.g.*, C.D. ILL. R. 17(E); N.D. IND. R. 32; S.D. IND. R. 33; E.D. KY. R. 23; W.D. KY. R. 23; W.D. MICH. R. 44; D. MONT. STANDING ORDER No. 6A; D. NEV. R. 185; N.D. OHIO R. 17.02; N.D. OKLA. R. 17.1; W.D. OKLA. R. 17; M.D. TENN. R. 602.

25. *See* Lambros, *Summary Jury Trial*, *supra* note 6, at 290.

nationwide have implemented the procedure.[26] It would seem, therefore, that the summary jury trial is firmly engrafted into the federal judicial system.

B. The Process[27]

The summary jury procedure is "simply a jury trial without the presentation of live evidence."[28] The unique factor which separates the summary jury trial from other alternate dispute resolution methods is the utilization of "the age old jurisprudential concept of trial by jury."[29]

Although Judge Lambros pointed out that all jury cases may be appropriate for summary jury trial,[30] he added that effective pretrial conferencing is the key to determining suitability.[31] The process generally is used when settlement is hindered because the parties cannot agree on how a jury will perceive and evaluate the evidence.[32] Primarily, the

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26. Marcotte, *supra* note 6. States which have used the summary jury trial include Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, and West Virginia. *See* Strandell v. Jackson County, 115 F.R.D. 333 (S.D. Ill. 1987), *rev'd*, 838 F.2d 884 (7th Cir. 1988); Caldwell v. Ohio Power Co., 710 F. Supp. 194, 202 (N.D. Ohio 1989); Federal Res. Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988); Arabian Am. Oil Co. v. Scarfone, 685 F. Supp. 1220, 1221 (M.D. Fla. 1988); Jones-Hailey v. Corp. of TVA, 660 F. Supp. 551, 553 (E.D. Tenn. 1987); King v. E.F. Hutton & Co., Inc., 117 F.R.D. 2, 11 n.14 (D.D.C. 1987); Fraley by Fraley v. Lake Winnepesaukah, Inc., 631 F. Supp. 160, 163 (N.D. Ga. 1986); Hall v. Ashland Oil Co., 625 F. Supp. 1515, 1523 (D. Conn. 1986); Watts v. Des Moines Register, Civ. No. 85-757-A (S.D. Iowa Aug. 1, 1986); Stacey v. Bangor Punta Corp., 107 F.R.D. 779, 782 (D. Maine 1985); Negin v. City of Mentor, Ohio, 601 F. Supp. 1502, 1505 (N.D. Ohio 1985); Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1372 (D. Minn. 1985).

27. The process described in this Note is based on the model developed by Judge Lambros. However, each court may tailor the process to its own liking. *See* Lambros, *Summary Jury Trial*, *supra* note 6, at 290 (a flexible procedure).

28. Spiegel, *supra* note 6, at 829; Brenneman and Wesoloski, *supra* note 6, at 888 (summary jury trial is a non-binding jury trial without the presentation of live evidence).

29. Lambros, *A Report*, *supra* note 6, at 468. *See* Lambros, *Summary Jury Trial*, *supra* note 6, at 286 (absence of jury in the decision making process is the shortcoming of nearly every settlement alternative).

30. Lambros, *A Report*, *supra* note 6, at 472 (The summary jury trial "is not limited to negligence actions, nor to actions which have only two parties. . . . [I]t has also been successfully utilized in litigation involving multiple parties, and in such substantive areas as products liability; personal injury; contract; age, gender, and race discrimination; and antitrust.").

31. *Id.*

32. *Id.* at 471-72. *See* Lambros, *Summary Jury Trial*, *supra* note 6, at 286 (discusses several possible reasons for inability to settle which make summary jury trial appropriate).

summary jury trial is intended for cases that will not settle through more traditional methods.[33]

Judge Lambros defined the summary jury process as "counsels' presentation to a jury of their respective views of the case and the jury's advisory decision based on such presentations."[34] The parties (clients) *must* attend the summary jury trial because the "clients' awareness of the jury's perception is as important as that of counsels'."[35] Ideally, the proceeding is designed to last only one to two days.[36] It is conducted by a judge, preferably the judge who ultimately will try the case if it goes to full trial,[37] or a magistrate as assigned by the court.[38] As Judge Lambros emphasized, "it is essential that a person of authority conduct the proceeding, in a courtroom, in order to maintain the aura of actual trial."[39]

Summary jury trials are nonbinding unless the parties agree otherwise.[40] Some courts urge the parties to dispose of their cases by stipulating that the summary jury's advisory verdict will be binding.[41] In one case, Judge Lambros stated: "The parties should consider the possibility of consenting to a binding summary jury trial. This would obviate the need for a formal jury trial while providing a just, expedient, and inexpensive means of resolving this dispute."[42]

Prior to the summary jury trial, a final pretrial conference should be held wherein the judge determines that all discovery has been completed and the case is ready for trial.[43] The pretrial conference also provides

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33. Lambros, *Summary Jury Trial*, *supra* note 6, at 286 (the "complex case" is most suitable).

34. Lambros, *A Report*, *supra* note 6, at 468.

35. *Id.* at 470.

36. However, the summary jury trial in the *General Electric* case lasted 14 days. *See* Brief of Appellants on the Merits at 9, *General Elec.*, 854 F.2d 900.

37. Lambros, *Summary Jury Trial*, *supra* note 6, at 288. Lambros explains that a subsequent trial probably will not be affected by the participation of the judge who presided over the summary jury trial because the jury remains the ultimate trier of fact. *Id.* In regard to traditional settlement conferences, many attorneys and commentators have expressed concern over the same judge presiding over both settlement negotiations and the trial of the matter. *See* BRAZIL, *supra* note 5, at 418-24. However, because the summary jury trial is not a "settlement conference," implements the use of a jury, and is supposed to involve only evidence admissible at trial, fairness should not be compromised by the presence of the same judge. In fact, Judge Lambros believes that the quality of the actual trial may be improved because "the judge will have become intimately acquainted with the legal issues posed by the case." Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

38. Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

39. Lambros, *A Report*, *supra* note 6, at 470.

40. Lambros, *Summary Jury Trial*, *supra* note 6, at 286.

41. *Id.* at 290.

42. *Negin*, 601 F. Supp. at 1505.

43. Lambros, *A Report*, *supra* note 6, at 470; Lambros, *Summary Jury Trial*, *supra* note 6, at 287.

an opportunity for setting limits on evidentiary presentations at the summary jury trial.[44] The judge should rule on any motions *in limine* and other objections prior to the proceeding.[45] The objective is to settle as many evidentiary and procedural questions as possible prior to the summary jury trial. Ideally, the proceeding will flow without the interposition of many formal objections.[46]

At least three working days before the summary jury trial, the court should require counsel to file trial memoranda and to propose *voir dire* questions and jury instructions.[47] The court may also require witness and exhibit lists if extensive presentations are expected.[48]

The jury panel, consisting of ten potential jurors, "is drawn from the pool in the same manner as is a regular petit jury."[49] Thus, the court compels ordinary citizens to appear and sit as a jury venire at public expense.[50] Six jurors[51] are chosen via an expedited jury selection which provides "short character profiles" of each juror. The court's *voir dire* examination is brief, and counsel are usually permitted limited challenges for cause and peremptory challenges.[52] The judge explains the summary jury trial procedure to the jury, but advises the jurors to consider the case as seriously as they would if the case were presented in a "traditional" manner.[53] The jury is told that the verdict must be a true verdict based on the evidence, but "nothing more is said about the non-binding nature of the summary jury trial."[54] The non-binding character of the proceeding is not explicitly revealed to the jurors to avoid any possibility that they will not take their duty seriously. Thus, the jurors probably assume their verdict is final.[55]

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44. *Id.*

45. *Id.*

46. *Id.*

47. Lambros, *A Report*, *supra* note 6, at 470; Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

48. Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

49. Lambros and Shunk, *supra* note 6, at 47.

50. Petition for a Writ of Certiorari at 6, *General Elec.*, 854 F.2d 900. *See* Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1877. However, Judge Battisti of the United States District Court for the Northern District of Ohio recently found that federal courts lack authority to compel jurors for summary jury trials. Hume v. M. & C. Management, 129 F.R.D. 506 (N.D. Ohio 1990).

51. Judge John McNaught, United States District Court for District of Massachusetts, uses five jurors to assure no tie votes in the advisory verdicts. BRAZIL, *supra* note 5, at 64.

52. Lambros, *A Report*, *supra* note 6, at 470-71; Lambros, *Summary Jury Trial*, *supra* note 6, at 289.

53. Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

54. *Id.* at 289.

55. Brenneman and Wesoloski, *supra* note 6, at 890 (discussion as to whether it is a wise decision to avoid telling the jurors that the verdict is non-binding).

All evidence is presented by the attorneys who may mingle the factual representations with legal arguments.[56] Opening statements and closing arguments are permitted. Generally, one hour of time is allotted to each side to present its best case.[57] Normally, no live witnesses are presented, although some courts have allowed them.[58] Counsel usually summarize the anticipated testimony of trial witnesses and present exhibits to the jury.[59] However, "counsel are limited to presenting representations of evidence that would be *admissible at trial*. Representations of facts must be supportable by reference to discovery materials, . . . or by a professional representation that counsel has spoken with the witness and is repeating that which the witness stated."[60] Objections during the proceeding are discouraged, but, if needed, will be entertained.[61]

At the conclusion of the presentations, the jury receives streamlined final instructions on the substantive law and is sent into deliberations. Although a unanimous verdict is encouraged, the jury may return separate, individual verdicts if a consensus is not possible.[62] Usually, the jury is given a verdict form eliciting answers to specific interrogatories, including a general inquiry regarding liability and the plaintiff's damages.[63]

After the court receives the verdict, the attorneys, the court, and the parties may engage in dialogue with the jurors to gain insight into the jurors' perception of the case and its presentation. This dialogue may serve as a "springboard" for later settlement negotiations.[64]

The summary jury trial is then concluded. In some cases, settlement negotiations may proceed immediately after the summary jury trial, but usually a settlement conference is scheduled "several days to a month" after the proceeding.[65] The summary jury trial experience is used as a "looking glass" to help facilitate the settlement.

According to Judge Lambros, the purpose behind the summary jury trial is to "provide a predictive tool to be used in the settlement

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56. Lambros, *A Report*, *supra* note 6, at 471; Lambros, *Summary Jury Trial*, *supra* note 6, at 289.

57. This may be broken up so that rebuttal time is allowed. Lambros, *Summary Jury Trial*, *supra* note 6, at 289.

58. Strandell, 115 F.R.D at 334; Levin and Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 38 (1985).

59. Lambros, *A Report*, *supra* note 6, at 471.

60. *Id.* (emphasis added).

61. *Id.*

62. *Id.*

63. Lambros, *A Report*, *supra* note 6, at 471; Lambros, *Summary Jury Trial*, *supra* note 6, at 289.

64. Lambros, *Summary Jury Trial*, *supra* note 6, at 289-90.

65. *Id.* at 290.

negotiations; it is not a technique to obviate the need for old-fashioned settlement talks."[66] Thus, the purpose behind the process necessarily bifurcates the summary jury trial from the post-summary trial settlement conference and negotiations. The summary jury trial itself is a judicial, or at least quasi-judicial, proceeding — neither settlement discussions nor negotiations occur at this stage.

II. The First Amendment Right of Public Access to Judicial Proceedings[67]

A. Birth of a First Amendment Right to Judicial Proceedings: Richmond Newspapers, Inc. v. Virginia[68]

In its "watershed"[69] decision in 1980, the United States Supreme Court recognized a new branch of first amendment law which guarantees the public and the press a right to observe judicial proceedings.[70] The Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment [and] without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated."[71]

The first amendment prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[72] Free speech also carries with it "freedom to listen," also known as a first amendment right to "receive information and ideas."[73] The Court reasoned, "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long

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66. Lambros and Shunk, *supra* note 6, at 48. Judge Lambros indicates that it is a tool *to be used* in negotiations, not that the procedure itself is part of the settlement negotiations.

67. *See generally* Fenner and Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 Harv. C.R.-C.L. L. Rev. 415 (1981); Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 Sup. Ct. Rev. 1; Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv. L. Rev. 1899 (1978); Recent Development, *Public Access to Civil Court Records: A Common Law Approach*, 39 Vand. L. Rev. 1465 (1986).

68. 448 U.S. 555 (1980).

69. *Id.* at 582 (Stevens, J., concurring).

70. *Id.* at 576.

71. *Id.* at 580.

72. U.S. Const. amend. I.

73. *Richmond Newspapers*, 448 U.S. at 576 (citing Kleindienst v. Mandel, 408 U.S. 753, 762 (1971)).

been open to the public at the time that Amendment was adopted."[74]

Although the Court's holding was restricted to "criminal" trials, Chief Justice Burger noted that the question of whether the public has a right of access to *civil* trials was not presented in the case at bar, but that historically the presumption of openness applied to both civil and criminal trials.[75] Justice Stewart was adamant in his view that the first amendment "clearly" gives the public and press a right of access to both civil and criminal trials.[76] The case represents the Court's consensus view that the "unfettered discretion" of the judge and the parties to close a trial is repugnant to the first amendment.[77]

Historical practice played a distinct part in the decision and will prove instructive in this Note's analysis as well. The Court relied on the significant historical pattern that "throughout its evolution, the trial has been open to all who cared to observe."[78] In fact, the rule in England from "time immemorial" appears to have required all trials to be held in open court with free access to the public.[79] The English attribute of presumptively open trials was carried over into the judicial systems of colonial America.[80] Likewise, the "unbroken, uncontradicted" history of openness is as valid today as it was in centuries past.[81]

The Court in *Richmond Newspapers* also determined that the history of public access demonstrated a widespread recognition that open trials have significant community therapeutic value.[82] The Court reasoned that although citizens in an open society do not demand infallibility, it is nonetheless "difficult for them to accept what they are prohibited from observing."[83] Justice Brennan stated:

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74. *Id.*

75. *Id.* at 580 n.17.

76. *Id.* at 599 (Stewart, J., concurring).

77. *Id.* at 598 (Brennan, J., concurring).

78. *Id.* at 564. The Court traced the history of open trials. *Id.* at 565-73. Since the days of ancient Athens, trials have been significant community events. *See* L. MOORE, PALLADIUM OF LIBERTY 2 (1973). In pre-Norman England, cases generally were brought before "moots" which were attended by the freemen of the community. *Richmond Newspapers*, 448 U.S. at 565. Reports of the Eyre of Kent reveal a recognition that public attendance, other than for "jury duty," is important to the proper functioning of justice. *Id.* at 566.

79. *Richmond Newspapers*, 448 U.S. at 566-67 (English courts called the presumptive openness of the trial "one of the essential qualities of a court of justice.").

80. *Id.* at 567. For example, the 1677 Concessions and Agreements of West New Jersey expressly recognized openness of trials as the fundamental law of the Colony. *Id.*

81. *Id.* at 573.

82. *Id.* at 570. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571 (quoting 1677 Concessions and Agreements of West New Jersey).

83. *Id.* at 572.

> Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.[84]

Thus, history is replete with evidence of a continuing adherence to presumptively open trials.

The Court carefully noted that the first amendment right of access is not absolute.[85] However, only an "overriding interest articulated in findings" will overcome the presumption of openness.[86] The Court declined to define the circumstances under which the trial might be closed to the public, but suggested that a trial judge may impose reasonable limitations in the fair administration of justice.[87]

A first amendment right of free and open access to judicial proceedings was explicitly recognized. The proverbial floodgates were swinging open and, as will be seen, the *Richmond Newspapers* offspring successfully expanded, broadened, and extended the reach of this landmark decision.[88]

B. The Progeny: The Expansion of a Doctrine

The United States Supreme Court entertained the issue of public access to judicial proceedings in three post-*Richmond Newspapers* decisions. In 1982, in *Globe Newspaper Co. v. Superior Court*,[89] the Court struck down a Massachusetts statute which mandated the exclusion of the general public from the courtroom during the testimony of a minor

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84. *Id.* at 595 (Brennan, J., concurring).

85. *Id.* at 581 n.18.

86. *Id.* at 581 ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.").

87. *Id.* at n.18 ("It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets. . . . [S]ince courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated."). *See id.* at 598 n.24 (Brennan, J., concurring) ("[N]ational security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets."). *See also infra* note 92.

88. One commentator wrote that "after the *Richmond* case, there may at some point in time be no need for [the Freedom of Information Act], or sunshine act of any kind." Goodale, *Gannet is Burned by Richmond's First Amendment 'Sunshine Act'*, Nat'l L. J., Sept. 29, 1980, at 24. *See* Freedom of Information Act, 5 U.S.C. § 552; Federal Sunshine Act, 5 U.S.C. § 552b(c).

89. 457 U.S. 596 (1982).

rape victim.[90] The Court held that the state statute violated the first amendment, which embraces a right of access to criminal trials.[91] However, Justice Brennan noted that the Court's holding was a narrow one: a *mandatory* rule, requiring no particularized determinations in individual cases, is unconstitutional.[92]

In *Globe Newspaper*, the Court bolstered the historical analysis in *Richmond Newspapers*. Although recognizing the right of access was not absolute, the Court actually strengthened the presumption of openness. The Court required that the state's justification in denying access be a "weighty one," that the denial be necessitated by a "compelling governmental interest," and that the denial be "narrowly tailored to serve that interest."[93] The Court reasoned that the compelling interest of protecting minor victims of sex crimes from further trauma or embarrassment does not justify *mandatory* closure.[94] The circumstances should be determined on a case-by-case basis.[95] Thus, the trial court failed to "narrowly tailor" its denial of access to serve the interest involved. Evidence of a compelling governmental interest necessarily mandates a greater scrutiny than the nebulous "overriding interest" standard of *Richmond Newspapers*. The presumption of openness became even stronger with the *Globe Newspaper* decision.

In 1984, the Court expanded its openness doctrine and determined that the guarantee of open public proceedings in criminal trials embraces *voir dire* proceedings.[96] The opinion combined language of both *Richmond Newspapers* and *Globe Newspaper*:

> [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[97]

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90. *Id.* at 598 n.1 and accompanying text.

91. *Id.* at 610-11.

92. *Id.* at n.27 (emphasis added) (In certain cases and under appropriate circumstances, the public may be properly excluded from the courtroom during the testimony of minor rape victims).

93. *Id.* at 606-07.

94. *Id.* at 607-08 (The circumstances of the particular case may affect the significance of the interest.).

95. *Id.*

96. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*). The court observed that "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." *Id.* at 505.

97. *Id.* at 510.

In 1986, the Court significantly broadened the reach of the first amendment right of access to include pretrial proceedings in criminal cases,[98] particularly to preliminary hearings where only the prosecution's evidence is presented.[99] The Court determined that the label given to a proceeding is not conclusive evidence and rejected the argument that the first amendment was not implicated simply because the proceeding was not a "trial," but was a "preliminary hearing."[100]

The Court determined, based on its previous first amendment decisions, that in deciding whether the qualified first amendment right of access attaches to a proceeding, two complementary considerations must be examined: 1) whether the place and process have historically been open to the public; and 2) whether public access plays a significant positive role in the functioning of the process.[101] If a particular proceeding "passes these tests of experience and logic," a qualified first amendment right of access attaches, and the court must determine whether a narrowly tailored and compelling governmental interest in closure exists to overcome the presumption of openness.[102]

In addition to the Supreme Court, several federal circuit courts have dealt with this issue.[103] *Brown & Williamson Tobacco Corp. v. F.T.C.*[104]

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98. Press Enterprise Co. v. Superior Court, 478 U.S. 1, 10 n.3 (1986) (*Press-Enterprise II*) ("The vast majority of States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings. [citations omitted] Other courts have noted that some pretrial proceedings have no historical counterpart, but, given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply.").

99. *Press-Enterprise II*, 478 U.S. 1.

100. *Id.* at 7.

101. *Id.* at 8. These are described as "considerations" and not "absolute requirements." *Id.*

102. *Id.* at 9.

103. For decisions regarding public right to access judicial proceedings, see, e.g., Bailey v. Systems Innovation, Inc., 852 F.2d 93 (3d Cir. 1988) (pretrial gag order imposed on litigants violated first amendment rights of access); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (exclusion of public and press from civil pretrial hearing on injunction motion and sealing transcript of hearing violated first amendment rights); Westmoreland v. Columbia Broadcasting Sys., Inc., 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985) (first amendment right of access did not permit television news network to televise trial); Doe v. Meachum, 126 F.R.D. 452 (D. Conn. 1989) (court refused request for in-chambers preliminary injunction hearing based upon first amendment presumption of open courtrooms and decision that a less restrictive alternative than blanket closure order could be used to protect the privacy interests of plaintiff inmates with AIDS).

For decisions regarding public access to judicial records, see, e.g., F.T.C. v. Standard Fin. Management Corp., 830 F.2d 404 (1st Cir. 1987) (sealed financial statements filed with court as part of settlement agreement considered court-related documents to which first amendment presumption of public access attached); Bank of America Nat. Trust and

is a particularly important decision because the court concluded that the first amendment rights of access apply to civil, as well as criminal, trials.[105] The Sixth Circuit relied on the Supreme Court's reasoning in *Richmond Newspapers*: "The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption."[106]

At issue in *Brown & Williamson Tobacco Corp.* were sealed documents containing information on the tar and nicotine contents of cigarettes. The Sixth Circuit held that the district court abused its discretion in sealing the documents.[107] In particular, the circuit court held that "simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."[108] The Sixth Circuit concluded that in this type of case a court should not seal the records unless legitimate trade secrets are involved, a recognized exception to the right of public access to judicial records.[109]

Another leading case applying the first amendment considerations of *Richmond Newspapers* to a civil setting was *Publicker Industries, Inc. v. Cohen*.[110] The Third Circuit not only held that the first amendment

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Sav. Ass'n. v. Hotel Rittenhouse, 800 F.2d 339 (3d Cir. 1986) (once a settlement is filed in court, it becomes a judicial record and is subject to public access); *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) (district court did not violate first amendment right of public access by sealing documents only until entry of judgment, although common law right may have been violated); Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985) (access to sealed record of settled products liability action allowed by subsequent plaintiff; defendant's desire to prevent use of the trial record in other proceedings was not adequate justification for closure); *In re* Continental Illinois Sec. Litig., 732 F.2d 1302 (7th Cir. 1984) (newspapers entitled to special litigation committee report in shareholder derivative suit); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (confidentiality agreement between parties did not bind court with respect to access to documents); Joy v. North, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983) (special litigation committee report should not have been sealed); United States v. Kentucky Util. Co., 124 F.R.D. 146 (E.D. Ky. 1989) (confidentiality orders arrived at by the parties in absence of press and public, even though endorsed by court, should not be binding when subsequent motion seeking access is filed).

104. 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

105. *Id.* at 1179 ("The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases.").

106. *Id.*

107. *Id.* at 1176.

108. *Id.* at 1179.

109. *Id.* at 1180. *See infra* Section IV(C).

110. 733 F.2d 1059 (3d Cir. 1984).

rights of public access apply to civil trials, but that the presumption of openness also attaches to pretrial hearings.[111] The case involved a proxy fight over control of a corporation. The circuit court held that the district court abused its discretion by excluding the public and the press from the hearing on temporary injunction motions.[112]

Since the *Richmond Newspapers* decision, the federal courts have gradually expanded the reach of the first amendment right of public access to include *voir dire* proceedings,[113] preliminary hearings in criminal cases,[114] civil proceedings, pretrial proceedings, civil court records, and even sealed settlement agreements.[115] Based on the courts' growing tendency to apply the first amendment presumption of openness to modern courtroom proceedings and records, and the considerations involved, it is inevitable that the qualified first amendment rights of public access should attach to summary jury trials.[116]

III. The *General Electric* Case[117]

The plaintiffs, three Ohio utility companies, jointly undertook to build the William H. Zimmer Nuclear Power Plant. In July of 1984, the plaintiffs sued General Electric ("G.E."), alleging that G.E. sold them a nuclear reactor containment system knowing that it was incapable "of meeting all regulatory requirements and operating in a safe manner."[118] Early in the litigation process the parties requested that certain discovery material be kept confidential and agreed on a comprehensive protective order, approved by the magistrate, which classified various documents as either "confidential" or "highly confidential."[119]

In June of 1987, the district court ordered the parties to participate in a summary jury trial.[120] The order closed the summary jury proceeding to the press and the public.[121] The appellants, three Ohio newspapers,

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111. *Id.* at 1074. *See also* Doe v. Meachum, 126 F.R.D. at 455.

112. *Publicker*, 733 F.2d at 1074.

113. *Press-Enterprise I*, 464 U.S. 501.

114. *Press-Enterprise II*, 478 U.S. 1.

115. *See* cases cited *supra* note 103.

116. *See infra* Section IV.

117. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989).

118. Plaintiffs' Second Amended Complaint and Jury Demand, Joint Appendix at 76, 96, *General Elec.*, 854 F.2d 900.

119. *General Elec.*, 854 F.2d at 901.

120. *Id.*

121. The decision to close the summary jury trial was actually a compromise between the court and the parties. G.E. had initially opposed the summary jury proceeding. *See* General Electric Company's Motion to Vacate Summary Jury Trial, Joint Appendix at 258, *General Elec.*, 854 F.2d 900. Judge Spiegel's "order closing the summary jury trial was in response to General Electric's substantial concerns regarding the potential lack of confidentiality." *General Elec.*, 854 F.2d at 902 n.2.

moved to intervene for the limited purpose of challenging the closure order based upon their first amendment right of access.[122]

The district court denied the motion to intervene, holding that the newspapers had no right to attend the summary jury trial.[123] The court concluded that "[t]he summary jury trial, for all it may appear like a trial, is a settlement technique,"[124] that there is no tradition of access to summary jury trials, and that public access to summary jury trials does not play a particularly significant positive role in the actual functioning of the process.[125] The court also amended its original closure order by including a gag order on the jurors and sealing the jury list.[126]

Finally, two months after the summary jury trial concluded and the parties had reached a settlement, the court issued an order approving the terms of the settlement and dismissing the action with prejudice.[127] The court continued the gag order and sealed the transcript and jury list indefinitely.[128]

The intervenors appealed, claiming that the first amendment right of access adheres to the summary jury trial proceeding.[129] The Sixth Circuit determined that a proper analysis of a first amendment claim of access involves two complementary considerations: 1) the proceeding must be one where a "tradition of accessibility" has existed, that is, whether the place and process were historically open, and 2) the public access must play a "significant positive role in the functioning of the particular process in question."[130]

In addressing the first consideration, the Sixth Circuit agreed with the district court's reasoning that because summary jury trials had existed for less than a decade, no historically recognized right of access applies.[131] Because the summary jury trial was designed to promote settlement, the court designated it as a "settlement technique" and determined that "[s]ettlement techniques have historically been closed to the press and public."[132] The court concluded that the "tradition of accessibility" element had not been met.[133]

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122. *General Elec.*, 854 F.2d at 902.
123. *Id.*
124. *Id.* (quoting *General Elec.*, 117 F.R.D. at 600).
125. *Id.* (quoting *General Elec.*, 117 F.R.D. at 602).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 903 (quoting *Press-Enterprise II*, 478 U.S. at 8). However, the language of *Press-Enterprise II* indicates that these are "considerations" which have been "emphasized" in prior decisions, not that they "must" be present. *Press-Enterprise II*, 478 U.S at 8.
131. *General Elec.*, 854 F.2d at 903.
132. *Id.*
133. *Id.* at 904.

A glaring absence from the court's discussion of the "tradition of accessibility" consideration is the determination of whether the *location* involved in the process has been historically open to the public. There was no mention of what part the public courtroom plays in the summary jury proceeding.[134] A proper analysis of this point should have altered the court's determination.[135]

Regarding the second consideration, the Sixth Circuit summarily disagreed with the appellants' contention that "public access would have community therapeutic value because of the importance of the nuclear power and utility rate issues raised."[136] No specific reason was given for this disagreement. Instead of considering the many positive roles public access would play in this summary jury trial, the court *weighed* public access against the interest in settlement.[137] The court decided that settlement was more important — that if settlement could not be achieved with public access, then public access should not be allowed.[138] The court explained that "public access to summary jury trials over parties' objections [because of their interest in confidentiality] would have significant adverse effects on the utility of the procedure as a settlement device."[139] In particular, the court reasoned that "allowing access would undermine the substantial governmental interest in promoting settlements, and would not play a 'significant positive role in the functioning of the particular process in question.'"[140] Properly viewed, however, balancing a "substantial governmental interest" against public access is the qualifying test used to determine whether an interest in closure is sufficient to overcome the presumption of openness, not whether the presumption should exist at all.[141] The court prematurely tied the balancing process of the competing interests of closure and openness to the second con-

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133. *Id.* at 904.

134. The consideration of "tradition of accessibility" involves an examination of whether the *place* and *process* have traditionally been open to the public. *Press-Enterprise II*, 478 U.S. at 8. The Sixth Circuit addressed the "process" question, but not the "place."

135. *See infra* Section IV(B)(1).

136. *General Elec.*, 854 F.2d at 904. The appellants also recited several other reasons why public access plays a significant role in the summary jury trial. *See infra* note 184. However, the court ignored them.

137. *General Elec.*, 854 F.2d at 904.

138. *Id. But see infra* Section IV(C)(1).

139. *Id.*

140. *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 8). The court relied on Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) and Courier-Journal v. Marshall, 828 F.2d 361 (6th Cir. 1987) in its analysis. However, as the appellants correctly pointed out, these two cases are inapposite because they concerned access to raw discovery materials possessed by the parties and not filed with the court. *See* Brief of the Appellants on the Merits at 28 n.7, *General Elec.*, 854 F.2d 900.

141. *See infra* Section IV(C).

sideration of whether public access would provide a significant positive role. By manipulating this test, the court successfully sidestepped the second consideration.

Judge Edwards concurred in part and dissented in part. He joined the majority in holding that "the negotiations which led to the settlement of this case could properly be conducted *in camera*."[142] However, he did not agree that the "record can appropriately continue to be sealed after a settlement has been effected."[143] Judge Edwards reasoned that although the right to access may impede settlements, he could not "reconcile complete suppression of this record with the First Amendment which our forefathers placed as the first condition for the founding of our nation."[144]

IV. The First Amendment Right of Access Should Attach to Summary Jury Trials[145]

A. The Dichotomy of a Label: Settlement Technique or Judicial Proceeding?

Central to the question of whether the first amendment rights of access attach to the summary jury trial is the dichotomous nature of the process. The actual proceeding, conducted by a judge in front of an actual petit jury in a public courtroom, involves no settlement discussions or negotiations.[146] It is an adversary proceeding encompassing the presentation of evidence and trial advocacy. Even Judge Spiegel, in

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142. *General Elec.*, 854 F.2d at 905 (Edwards, J., concurring in part and dissenting in part).

143. *Id.* Appellants thoroughly discussed issues related to the propriety of sealing the transcript and continuing the gag orders. However, those issues are outside the scope of this Note.

144. *Id.*

145. Some commentators have addressed this issue as it relates to the rent-a-judge procedure. *See* Gnaizda, *Secret Justice for the Privileged Few*, 66 Judicature 6 (June-July 1982); *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 Vand. L. Rev. 845, 1019-28 (1984); Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 Harv. L. Rev. 1592, 1608-15 (1981). The rent-a-judge process bypasses the formal court system. A referee selected and paid by the litigants presides over the case and renders a binding decision. Note, *id.* at 1592.

146. However, assuming *arguendo* that the summary jury trial does involve settlement communications, it "by no means follows that material from settlement negotiations is protected from discovery just because a rule of evidence would make that material inadmissible for certain purposes at trial." Brazil, *supra* note 5, at 306. *See* Fed. R. Evid. 408.

General Electric, conceded that the summary jury trial is not a settlement conference, but a pretrial proceeding.[147]

The summary jury trial "facilitates" settlement of disputes, as does the entire litigation process. The proceeding is not, in and of itself, a recognized settlement session, such as an in-chambers settlement conference, a private negotiation, or a mediation, all of which involve characteristic "give and take" discussions.[148] The traditional settlement conference takes place *after* the summary jury trial — after an advisory verdict is presented and the advocacy ends.

Therefore, labeling a summary jury trial a "settlement technique" is a misnomer, and does not necessarily lead to closure. "[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where [the proceeding] functions much like a full-scale trial."[149] The tradition of openness is inherent in the unique elements of the summary jury trial. Summary jury trials, with their use of a petit jury and the presumptively open courtroom, graft the public aspects of judicial proceedings onto the alternate dispute resolution process and result in hybrid public procedures requiring qualified first amendment rights of access.

B. Complementary Considerations

1. Tradition of Accessibility.—Historical analysis requires consideration of whether both the "place" and the "process" have been traditionally open to the public.[150] The first prong of the tradition of accessibility is whether the "place" has been historically open to the public. Summary jury trials use the courtroom, a place which undoubtedly has been historically open to the press and public. Hence, summary jury trials easily satisfy the locality element of tradition.

The traditional public aspect of the courtroom has remained steadfast throughout the centuries. "[A] trial courtroom . . . is a public place where the people generally — and representatives of the media — have a right to be present, and where their presence has been thought to enhance the integrity and quality of what takes place. . . . 'What transpires in the courtroom is public property.'"[151] The summary jury trial takes place in a traditionally public forum where people historically have

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147. *General Elec.*, 117 F.R.D. at 602.

148. *See generally* Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 Am. B. Found. Res. J. 905.

149. *Press-Enterprise II*, 478 U.S. at 7.

150. *Id.* at 8.

151. *Richmond Newspapers*, 448 U.S. at 578, 573 n.9 (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)); *see also*, *id.* at 593 (Brennan, J., concurring) and at 600 (Stewart, J., concurring).

enjoyed a right of access. Furthermore, Judge Lambros relied on the use of the courtroom to promote the realistic character of the summary jury trial and enable it to function as a reliable predictor of the outcome of a full trial. Judge Lambros explained that "[i]t is essential that a person of authority conduct the proceeding, *in a courtroom*, in order to maintain the aura of actual trial."[152]

In *General Electric*, the Sixth Circuit ignored the tradition of accessibility given to the courtroom.[153] The court did not address the significance of the "place," which is important to the tradition of accessibility analysis. It is especially important when dealing with a summary jury trial analysis because the process is relatively new and any history of access is virtually nonexistent. Therefore, special emphasis should have been given to the place and resources used.

The second prong of the tradition of accessibility consideration is whether the "process" has been historically open to the public. Because the summary jury trial process is still young and evolving, an analysis of its tradition of accessibility is rather premature and somewhat irrelevant. However, it is important to note that the history of summary jury trials, although brief, shows no tradition of closure. The Sixth Circuit, in applying the right of access to judge disqualification proceedings, concluded that a tradition of closure is necessary to rebut a presumption of openness.[154] In fact, the summary jury trial has been presumptively open in the past. Judge Lambros instructed that "to achieve the goal of facilitating settlement, the summary jury trial is conducted in open court with appropriate formalities . . . ."[155] This attitude is consistent with the emerging trend of openness exhibited by the courts.[156] A presumption of openness should be maintained.

Summary jury trials are also analogous to ordinary civil jury trials, which the courts have deemed presumptively open to the public. In fact, Judge Spiegel described the summary jury trial as "simply a jury trial without the presentation of live evidence,"[157] and Judge Lambros referred

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152. Lambros, *A Report*, *supra* note 6, at 470 (emphasis added).

153. *See supra* note 134 and accompanying text.

154. *In re* National Broadcasting Co., 828 F.2d 340, 344 (6th Cir. 1987) (the court surveyed prior disqualification cases and found none "in which the proceedings were closed or the record sealed").

155. Lambros, *Summary Jury Trial*, *supra* note 6, at 286. Although Lambros originally had written in 1984 that summary jury trials were not open proceedings, he apparently changed his mind after more experience with the process. *See* Lambros, *A Report*, *supra* note 6, at 471. *See also Judges Should Have Call on Use, Closure of Proceeding, Lambros Says*, 2 Alternative Dispute Resolution Report (BNA) 251, 252 (July 21, 1988) (Judge Lambros has a preference for open proceedings, but says that a judge should decide).

156. *See supra* Section II(B).

157. Spiegel, *supra* note 6, at 829.

to it as a "capsulized trial procedure" which is "like a regular jury trial, only shorter."[158] The procedural likeness alone implies an historical presumption of openness.

The similarities between summary jury trials and civil jury trials run deeper than the surface. As the appellants in *General Electric* pointed out, "[b]oth use the courtroom facilities, the resources, and the power of the public judicial system to resolve disputes between litigants. In doing so, both procedures are the only civil proceedings that employ juries."[159] Judge Lambros also emphasized the role of the jury in the summary jury trial.[160] He stated that the jury is "central to the American tradition of justice" because it brings a "fresh viewpoint to the analysis of human affairs . . . [and] involves the citizens of this country in the process of deciding issues of importance to their community."[161]

The public has enjoyed the right to observe jury proceedings in public forums for centuries.[162] From ancient Athens to early England and colonial America, history is replete with evidence that the "public character of [jury] proceedings [has] remained unchanged."[163] The petit jury and the public courtroom have been recognized as "hallmarks of openness."[164] The presumption of openness applied to petit jury proceedings throughout history should naturally extend to summary jury trials. The public nature of the courtroom, coupled with the presumptively open process, exhibits that the historical tradition of accessibility is present in the summary jury trial.

2. Public Access: A Significant Positive Role in the Summary Jury Trial Process.—The second consideration in the analysis of a first amendment right of access is whether public access would play a "significant positive role in the functioning of the particular process in question."[165] Public access would play a significant positive role in summary jury trials in several ways.

A summary jury trial is designed to encourage settlement and clear the case from the court docket. It can have a final and decisive effect

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158. Lambros, *Summary Jury Trials*, 3 LITIG. 52, 53 (Fall 1986).

159. Brief of Appellants on the Merits at 24, *General Elec.*, 854 F.2d 900. *But cf.* Hume v. M. & C. Management, 129 F.R.D. 506 (N.D. Ohio 1990) (federal courts lack authority to summon jurors for summary jury trials).

160. Lambros, *Summary Jury Trial*, *supra* note 6, at 286.

161. *Id.*

162. *Richmond Newspapers*, 448 U.S. at 564-73; *Publicker*, 733 F.2d at 1068-70. *See generally* F. POLLOCK, THE EXPANSION OF THE COMMON LAW 30, 140 (1904); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 312, 317 (3d ed. 1922); Wells, *The Origin of the Petty Jury*, 27 L. Q. REV. 347, 355 (1911).

163. *Press-Enterprise I*, 464 U.S. at 506.

164. Petition for Writ of Certiorari at 18 n.12, *General Elec.*, 854 F.2d 900.

165. *Press-Enterprise II*, 478 U.S. at 8.

on the outcome of civil litigation. The summary jury trial is similar to the pretrial criminal proceedings which have been afforded first amendment rights of access.[166] In *Press-Enterprise II*, the Supreme Court observed that although preliminary hearings do not result in convictions, the outcome usually leads to final disposition through plea bargaining instead of trial.[167] The Court emphasized: "But these features, standing alone, do not make public access any less essential to the proper functioning of the proceedings in the overall criminal justice process. Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding."[168] Justice Powell stated a similar reason in acknowledging a first amendment right to observe pretrial suppression of evidence hearings: "[I]n this case there was no trial as, following the suppression hearing, plea bargaining occurred that resulted in guilty pleas. [Thus,] the public's interest in this proceeding often is comparable to its interest in the trial itself."[169]

Likewise, although the summary jury trial is nonbinding, the impact of the procedure nearly always results in settlement of the case.[170] District Court Judge Richard A. Enslen, Western District of Michigan, reported that neither the attorneys nor the clients want to try the case after the summary jury trial.[171] He said the clients "came to the courtroom, they saw the psychological clash they had been waiting for, they were either relieved or upset with the jury verdict, and they were not too willing to go on and do this process again."[172] Accordingly, the summary jury trial generally becomes the conclusive step in the civil proceeding. This is emphasized further by the ability of the parties to stipulate that the summary jury verdict is a "final determination on the merits."[173]

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166. Brief of Appellants on the Merits at 28, *General Elec.*, 854 F.2d 900. The appellants in *General Electric* referred to the summary jury trial as the "civil counterpart of the pretrial criminal proceedings." *Id.*

167. *Press-Enterprise II*, 478 U.S. at 12.

168. *Id.*

169. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 397 n.1 (1979) (Powell, J., concurring); *accord* United States v. Criden, 675 F.2d 550, 556-57 (3d Cir. 1982) (pretrial hearings often are "the most critical stage" because their outcomes "often determine whether the defendant or the Government wants to proceed to trial"); *In re* Herald Co., 734 F.2d 93, 98 (2d Cir. 1984) (public has right of access to pretrial criminal hearings because of their "decisive effect" upon the outcome of a prosecution).

170. Since 1980, Judge Lambros has conducted approximately 200 summary jury trials and only six have gone on to actual trial. *Judges Should Have Call on Use, Closure of Proceedings, Lambros Says*, 2 Alternative Dispute Resolution Report (BNA) 251, 252 (July 21, 1988).

171. *SJT, "Mediation," and Mini-Trials in Federal Court: An Interview with Judge Richard A. Enslen*, 2 ALTERNATIVES TO HIGH COST LITIG. 4, 7 (Oct. 1984).

172. *Id.*

173. Spiegel, *supra* note 6, at 831.

Some argue that all cases which settle prior to trial preclude the public from hearing the arguments on issues of public concern.[174] However, summary jury trials are not used for cases that otherwise could settle by traditional negotiations. The summary jury trial provides the psychological benefit of a trial by jury without the binding effect.[175] A case which settles after summary jury trial is not commensurate with one that settles by traditional means. In a summary jury trial, the court uses the public resources of an actual trial to settle a case which could not otherwise be settled. Therefore, because the summary jury trial usually supplants the actual jury trial, the proceeding should be open to the public because it "provides the sole occasion for public observation" of the judicial system at work.[176]

Public access would also provide a "community therapeutic value" to summary jury trials.[177] Open judicial proceedings provide an important outlet for "community concern, hostility, and emotions" raised by a particular case.[178] The Sixth Circuit recognized the community therapeutic value of open proceedings in *Brown & Williamson Tobacco Corp.*: "The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public."[179] *General Electric* exemplifies the important public interest in access. The parties raised issues regarding the safety of nuclear power plants, the integrity of a major corporation in selling key components of the plants, and whether millions of dollars spent in modifying the Zimmer power plant would be passed on to Ohio residents.[180] The district court even recognized that these were "matters of paramount public concern," and that the public "would be well-served by an airing of the issues" through an open summary jury trial.[181] Public access would have created a critical audience and encouraged a truthful exposition of facts, an "essential function of a trial."[182] As it stands, the public will

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174. *See General Elec.*, 117 F.R.D. at 601. *Cf.* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("To be against settlement is only to suggest that when the parties settle, society gets less than what appeals, and for a price it does not know it is paying.").

175. However, the parties may stipulate that the verdict is a final determination on the merits.

176. *Press-Enterprise II*, 478 U.S. at 12 (quoting *Richmond Newspapers*, 448 U.S. at 572).

177. *See Richmond Newspapers*, 448 U.S. at 570.

178. *Id.* at 571.

179. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

180. Brief of Appellants on the Merits at 33, *General Elec.*, 854 F.2d 900.

181. *General Elec.*, 117 F.R.D. at 600.

182. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1178.

remain in the dark regarding these important issues. "[N]o community catharsis can occur if justice is done in a corner [or] in any covert manner."[183]

Although other significant roles could be explored,[184] the decisive effect of the procedure and the community therapeutic value together provide enough evidence that public access plays a particularly significant role in the functioning of the summary jury trial. Therefore, the historical tradition of accessibility and the evidence that public access plays a significant role in the summary jury trial together satisfy the considerations of a proper first amendment right of access claim. Summary jury proceedings, like other modern courtroom procedures, should carry a presumption of openness.

C. A Qualified Right of Access

The first amendment right of public access is not absolute. When the right applies to a proceeding, however, a closure order is subject to strict scrutiny. The first amendment right of access will be violated unless the court demonstrates that closure is necessary to further "a compelling governmental interest, and is narrowly tailored to serve that interest."[185] In addition, the court must articulate findings that are "specific enough that a reviewing court can determine whether the closure order was properly entered."[186] The interest behind the closure must sufficiently overcome the presumption of openness, and the method of closure must be the least restrictive means of protecting that interest.[187]

The contours of a "compelling governmental interest" differ from case to case. The interest may involve the content of the information at issue, the relationship of the parties, or the nature of the controversy.[188] For instance, Justice Brennan suggested that national security concerns about confidentiality would warrant closures "during sensitive portions" of trial proceedings,[189] and several other federal courts have dealt with this weighing process since the *Richmond Newspapers* decision.[190]

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183. *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 571).

184. Appellants in *General Electric* provided several additional ways that public access serves the functioning of summary jury trials: it builds public confidence in the proceedings, it enhances the procedure's purpose of allowing the public to participate in the judicial process, it enhances the settlement function, and it serves as a check on the court's broad power of conscription. Brief of Appellants on the Merits at 35-42, *General Elec.*, 854 F.2d 900.

185. *Globe Newspaper*, 457 U.S. at 606-07.

186. *Press-Enterprise I*, 464 U.S. at 510.

187. *See Publicker*, 733 F.2d at 1074.

188. *Id.* at 1073.

189. *Richmond Newspapers*, 448 U.S. at 598 n.24 (Brennan, J., concurring).

190. *See* cases cited *supra* note 103.

1. Interest in Settlement.—The court in *General Electric* enunciated a commanding interest in encouraging settlement;[191] an interest which it believed was more important than the public's safety concerns regarding a nuclear power plant within its community.[192] The Third Circuit,[193] in holding that the district court abused its discretion by denying a motion to unseal settlement agreements filed in the court, clearly stated: "Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's . . . right of access."[194]

The Eleventh Circuit also broached this issue when it ordered a settled judicial record to be unsealed.[195] The court concluded, "There is no question that courts should encourage settlements. However, the payment of money to an injured party is simply not 'a compelling governmental interest' legally recognizable or even entitled to consideration in deciding whether or not to seal a record."[196]

Most recently, a federal district court in Kentucky determined that the conclusory statement "settlements will be impeded if confidentiality cannot be guaranteed" would not be sufficient to deny a newspaper access to documents obtained during discovery in a settled antitrust action.[197] This case is factually similar to the *General Electric* case and, interestingly, occurred in a district within the same circuit. One of the parties was a public utility accused of illegal antitrust activities which could have increased electric rates. The court determined that "the nebulous and conclusory showing of cause for protecting the documents is offset by the strong legitimate public concern demonstrated by the intervening newspaper in this matter."[198] The court found that "the public has a strong legitimate interest in being informed of the facts of any such activities."[199] This attitude is a far cry from the Sixth Circuit's decision in *General Electric*.

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191. *General Elec.*, 854 F.2d at 904. *Contra* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) ("Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

192. *Id.* (and also the possible increase in utility rates that the consumers might incur).

193. Bank of America Nat'l Trust v. Hotel Rittenhouse, 800 F.2d 339 (3d Cir. 1986).

194. *Id.* at 346.

195. Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985).

196. *Id.* at 1571 n.4.

197. United States v. Kentucky Util. Co., 124 F.R.D. 146, 153 (E.D. Ky. 1989).

198. *Id.*

199. *Id.*

2. Interest in Corporate Reputation.—In *General Electric*, G.E. originally opposed the summary jury procedure and voiced concerns regarding a need for confidentiality to protect its reputation.[200] Judge Spiegel honored G.E.'s concerns and closed the summary jury trial.[201] Several federal courts have balanced a company's interest in protecting its reputation against the presumption of openness and concluded that a simple showing that the company's reputation would be harmed does not overcome the strong presumption in favor of public access to court proceedings and records.[202] The Third Circuit strongly pointed out that "[t]he presumption of openness plus the policy interest in protecting unsuspecting people from investing in [the company] in light of its bad business practices are not overcome by the proprietary interest of present stockholders in not losing stock value or the interest of upper-level management in escaping embarrassment."[203] Furthermore, the Sixth Circuit itself had previously determined that:

> [t]he natural desire for parties to shield prejudicial information . . . from competitors and the public . . . cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know.[204]

The Sixth Circuit then concluded that only legitimate trade secrets would be a recognized exception to the right of public access in this type of situation.[205]

3. Interest in Subsequent Litigation.—Another fear that G.E. expressed regarding an open summary jury trial was the possibility of subsequent actions.[206] The First Circuit held[207] that a broad generalization that disclosure would be "detrimental to [a party] in other litigation"

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200. Transcript of In-Chambers Conference, Joint Appendix at 227, 229, *General Elec.*, 854 F.2d 900 (G.E. said that there was "[t]oo much at stake in terms of potential injury to [its] shareholders and [its] reputation and so forth.").

201. *Id.*

202. *Wilson*, 759 F.2d at 1571; *Publicker*, 733 F.2d at 1074; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

203. *Publicker*, 733 F.2d at 1074.

204. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180.

205. *Id.* General Electric never alleged the need for confidentiality based on protection of trade secrets. Petition for Writ of Certiorari at 10 n.6., *General Elec.*, 854 F.2d 900.

206. General Electric Company's Motion to Vacate Summary Jury Trial, Joint Appendix at 258, 261, *General Elec.*, 854 F.2d 900 ("G.E. cannot settle . . . because of the risk that such a settlement might encourage other utilities using similar containment systems to bring actions against G.E.").

207. F.T.C. v. Standard Fin. Management Corp., 830 F.2d 404 (1st Cir. 1987).

was an unacceptable reason for overriding the presumption of openness.[208] The court emphasized that the litigation involved a government agency and an alleged series of deceptive practices that allegedly resulted in widespread consumer losses.[209] The court determined that "[t]hese are patently matters of significant public concern," and the "threshold showing required for impoundment of the materials is correspondingly elevated."[210]

All of these decisions demonstrate that the first amendment right of public access to judicial proceedings and records "is no paper tiger."[211] If summary jury trials are arbitrarily closed to the public, litigants are likely to abuse the proceeding in an effort to avoid unwanted publicity, and the presumptively open trial will be undermined. Therefore, only the most compelling reasons should overcome the presumption of openness in summary jury trials.

V. Conclusion

General Electric provides dangerous precedent.[212] A summary jury trial uses public resources: ordinary citizens serve as jurors, a judge presides over the proceeding, and the venue is a public courtroom. The proceeding is characteristic of those which have been historically open, and public access serves a significant positive role in the summary jury trial by providing community therapeutic value to a process which supplants the ordinary trial.

Admittedly, the summary jury trial serves the purpose of facilitating settlement, but the process itself involves trial advocacy, not settlement negotiations, and can be decisively final. To summarily close to the public this unique process would serve a grave injustice — it would place a shroud of secrecy on our courtrooms.[213]

Opening the summary jury trial would not be tantamount to opening "old-fashioned settlement talks"[214] to the public. The summary jury

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208. *Id.* at 412.

209. *Id.*

210. *Id.*

211. *Id.* at 410.

212. At least one district court has followed the Sixth Circuit's decision regarding closure of the summary jury trial. *See* Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603, 607 (D. Minn. 1988) ("The parties have voiced a concern over the potential for premature publicity and public disclosure as a result of the SJT. This concern was alleviated by this court's agreement to close the SJT to the public. [citation to *General Electric*]").

213. *See Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring) ("Secrecy is profoundly inimical to . . . the trial process.").

214. Lambros and Shunk, *supra* note 6, at 48.

proceeding does not involve negotiations; therefore, it does not require the privacy afforded to such "confidential" conferences. If parties are concerned with confidentiality, they should strive to settle the matter in one of the many private ADR methods available before and after litigation ensues.[215] However, when the parties cannot settle without the opinion of a petit jury and require the resources of the public courtroom, secrecy should give way to a right of access. The parties should not be allowed to coerce the court into closing the summary jury trial by implying that settlement will not occur if the proceeding is open. Likewise, the courts should not be seduced by the opportunity to settle a case at the expense of the public's constitutional rights.

Several courts have addressed this issue and determined that a generalized interest in encouraging settlement does not rise to the level that would outweigh the public's right of access.[216] Excluding the press and the public from a summary jury trial is repugnant to the first amendment of the United States Constitution. The qualified first amendment right of access should attach to summary jury trials.

ANGELA WADE*

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215. For example, mediation, arbitration, mini-trial, and conciliation. *See generally* BRAZIL, *supra* note 5.

216. *See supra* Section IV(C)(1).

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TITLE INDEX, CONTRIBUTOR INDEX,
& TABLE OF CASES

TITLE INDEX

ARTICLES

1989 Developments in Federal Civil Practice Affecting Indiana Practitioners: Issues of Diversity Reform; Pendent Party Jurisdiction; Summary Judgment; Impeachment by Prior Conviction; Sanctions; and Appeal
John R. Maley 261
Enhancing Self-Determination Through Guardian Self-Declaration
Gerry W. Beyer 71
Estate Planning: The Use of Irrevocable Life Insurance Trusts
C. Daniel Yates
Michael O. Chenoweth 517
Health Law Update: A Survey of Recent Developments in Indiana Law Governing Health Care Providers
J. Michael Grubbs 391
Indiana Environmental Law: An Examination of 1989 Legislation
Thomas R. Newby
Stanley H. Rorick
Kevin W. Betz
Timothy L. Tyler 329
Indiana's New Financial Institutions Tax: An Extension of State Taxing Power Over Interstate Financial Transactions
Larry J. Stroble
Ronald d'Avis 551
Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?
Kathryn W. Tate 1
Oral Warranties and Written Disclaimers in Consumer Transactions: Indiana Does an End Run Around the U.C.C. Parol Evidence Rule
Harold Greenberg 199
Procedural Due Process in Postjudgment Garnishment Proceedings: Indiana Keeps Up With the Joneses
David L. Simmons 221
Recent Developments in the Worker's Compensation Act
Robert A. Fanning 643
Revision of the Uniform Partnership Act, An Analysis and Recommendations
Rodman Elfin 655
The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement
Cynthia K. Y. Lee 681
The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid
Caroline Forell 781
A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants
Stephen T. Maher
Dr. Lori Blum 821
Survey of Recent Developments in Family Law
Michael G. Ruppert 363
Survey of Recent Developments in Indiana Criminal Law and Procedure
Richard Kammen
Katharine L. Polito 303

Survey of Recent Developments in Indiana Labor Law
Leland B. Cross, Jr.
Douglas Craig Haney 445
Survey of Recent Developments in Indiana Products Liability Law
Michael Rosiello
Michael A. Klein 617
Survey of Recent Developments in the Indiana Rules of Trial Procedure in Civil Matters
Norman T. Funk 241
Survey of Recent Developments in Indiana Taxation Law
Lawrence A. Jegen, III
John R. Maley 531
Survey of Recent Developments in Insurance Law
John C. Trimble 431
Survey of Recent Developments in Medical Malpractice Law
Thomas R. Ruge 415
Survey of Recent Developments in Professional Responsibility
Roger D. Erwin 469
Survey of Recent Developments in Property Law
Walter W. Krieger 485
Survey of Recent Developments in Tort Law
John Talley 585
Time For an Intermediate Court of Appeals: The Evidence Says "Yes"
Stephen Safranek 863

CASE NOTE

The RICO/CRRA Trap: Troubling Implications for Adult Expression
Ken Nuger 109

ESSAY

Judge Hill's Rule
Winton D. Woods 137

NOTES

FAX Unto Others . . .: A Constitutional Analysis of Unsolicited Facsimile Statutes 703
The Impact of the Creation of the Court of Appeals for the Federal Circuit on the Availability of Preliminary Injunctive Relief Against Patent Infringement 169
The Life of Riley: Complete First Amendment Protection Versus Deferential Commercial Speech Standards for Professional Fundraising Solicitors 145
Pay Me Now or Pay Me Later?: The Question of Prospective Damage Claims for Genetic Injury in Wrongful Life Claims 753
The Proper Scope of Claimant Coverage Under the Indiana Medical Malpractice Act 899

The Proper Statute of Limitations on a Rule 10b-5 Action 731
The Short History of a Rule of Evidence That Failed (Federal Rule of Evidence 609, *Green v. Bock Laundry Machine Co.* and the New Amendment) 927
Summary Jury Trials: A "Settlement Technique" That Places a Shroud of Secrecy on Our Courtrooms? 949

CONTRIBUTOR INDEX
ARTICLES

BEYER, GERRY W., *Enhancing Self-Determination Through Guardian Self-Declaration* 71
CROSS, JR., LELAND B. & HANEY, DOUGLAS CRAIG, Survey of Recent Developments in Indiana Labor Law 445
ELFIN, ROBERT, *Revision of the Uniform Partnership Act, An Analysis and Recommendations* 655
ERWIN, ROGER D., *Survey of Recent Developments in Professional Responsiblity* 469
FANNING, ROBERT A., *Recent Developments in the Worker's Compensation Act* 643
FORELL, CAROLINE, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid* 781
FUNK, NORMAN T., *Survey of Recent Developments in the Indiana Rules of Trial Procedure in Civil Matters* 241
GREENBERG, HAROLD, *Oral Warranties and Written Disclaimers in Consumer Transactions: Indiana Does an End Run Around the U.C.C. Parol Evidence Rule* 199
GRUBBS, J. MICHAEL, *Health Law Update: A Survey of Recent Developments in Indiana Law Governing Health Care Providers* 391
JEGEN, III, LAWRENCE A. & MALEY, JOHN R., *Survey of Recent Developments in Indiana Taxation Law* 531
KAMMEN, RICHARD & POLITO, KATHARINE L., *Survey of Recent Developments in Indiana Criminal Law and Procedure* 303
KRIEGER, WALTER W., *Survey of Recent Developments in Property Law* 485
LEE, CYNTHIA K. Y., *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement* 681
MAHER, STEPHEN T. & BLUM, LORI, *A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants* 821
MALEY, JOHN R., *1989 Developments in Federal Civil Practice Affecting Indiana Practitioners: Issues of Diversity Reform; Pendent Party Jurisdiction; Summary Judgment; Impeachment by Prior Conviction; Sanctions; and Appeal* 261
NEWBY, THOMAS R., RORICK, STANLEY H., BETZ, KEVIN W. & TYLER, TIMOTHY L., *Indiana Environmental Law: An Examination of 1989 Legislation* 329
NUGER, KEN, *The RICO/CRRA Trap: Troubling Implications for Adult Expression* 109
ROSIELLO, MICHAEL & KLEIN, MICHAEL A., *Survey of Recent Developments in Indiana Products Liability Law* 617
RUGE, THOMAS R., *Survey of Recent Developments in Medical Malpractice Law* 415
RUPPERT, MICHAEL G., *Survey of Recent Developments in Family Law* 363
SAFRANEK, STEPHEN, *Time For an Intermediate Court of Appeals: The Evidence Says "Yes"* 863
SIMMONS, DAVID L., *Procedural Due Process in Postjudgment Garnishment Proceedings: Indiana Keeps Up With the Joneses* 221

STROBLE, LARRY J. & D'AVIS, RONALD, *Indiana's New Financial Institutions Tax: An Extension of State Taxing Power Over Interstate Financial Transactions* 551
TALLEY, JOHN, *Survey of Recent Developments in Tort Law* 585
TATE, KATHRYN W., *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?* 1
TRIMBLE, JOHN C., *Survey of Recent Developments in Insurance Law* ... 431
WOODS, WINTON D., *Judge Hill's Rule* 137
YATES, C. DANIEL & CHENOWETH, MICHAEL O., *Estate Planning: The Use of Irrevocable Life Insurance Trusts* 517

NOTES

BROECKER, EDWIN, *FAX Unto Others . . .: A Constitutional Analysis of Unsolicited Facsimile Statutes* 703
FRANZMANN, CHRISTOPHER, *The Proper Statute of Limitations on a Rule 10b-5 Action* 731
HARBOTTLE, DAN, *The Proper Scope of Claimant Coverage Under the Indiana Medical Malpractice Act* 899
KNIGHT, KEVEN, *The Life of Riley: Complete First Amendment Protection Versus Deferential Commercial Speech Standards for Professional Fundraising Solicitors* 145
MORRISON, WILLIAM, *The Impact of the Creation of the Court of Appeals for the Federal Circuit on the Availability of Preliminary Injunctive Relief Against Patent Infringement* 169
VOIGTMANN, MARK, *The Short History of a Rule of Evidence That Failed (Federal Rule of Evidence 609,* Green v. Bock Laundry Machine Co. *and the New Amendment)* 927
WADE, ANGELA, *Summary Jury Trials: A "Settlement Technique" That Places a Shroud of Secrecy on Our Courtrooms?* 949
WEBER, SUZANN, *Pay Me Now or Pay Me Later?: The Question of Prospective Damage Claims for Genetic Injury in Wrongful Life Claims* 753

TABLE OF CASES

A

Adam v. State 808, 810
Agency Holding Corp. v. Malley-Duff & Associates 744, 746-47, 750
Alberts v. Mack Trucks, Inc. 251, 253
Aldinger v. Howard 272, 274-76
Alexander v. Gardner-Denver 462
American Booksellers Association v. Hudnut 121
American Trucking Associations v. State 537
Anderson v. Liberty Lobby, Inc. 277
Arizona v. Youngblood 317-18
Art Hill, Inc. v. Heckler 202-03
Ashton v. Anderson 289-90
Associated Milk Producers v. Indiana Department of Revenue 544-45
Atkins v. Atkins 370-71
Atlas Powder Co. v. Ireco Chemicals 192, 194
Austin v. City and County of Honolulu 894

B

Baker v. Midland-Ross Corp. 595
Baldwin v. Hale 226
Barnes v. A.H. Robins Co. 610-11, 616, 639-40
Bates v. State Bar of Arizona 151, 165
Bateson v. Geisse 894
Batson v. Kentucky 321-22
Becker v. Schwartz 759
Beene v. Review Board of Indiana Department of Employment & Training Services 450, 465
Beeson v. Beeson 379, 383, 386
Bergfeld v. State 310-11
Berry v. Anaconda Corp. 650, 652
Bigelow v. Virginia 710
Biggans v. Bache Halsey Stuart Shields, Inc. 743
Blickenstaff v. Blickenstaff 379-80
Bloomington Country Club v. State 540-41
Board of Commissioners of County of Steuben v. Hout 602
Board of Trustees, S.U.N.Y. v. Fox 713
Bogdon v. Ramada Inn, Inc. 649-50
Bolger v. Youngs Drug Products Corp. 719, 722-24
Bonbrest v. Kotz 762
Bootz Manufacturing Co. v. Review Board of Indiana Employment Security Division 455
Bradfford v. Susquehanna Corporation 773
Brady v. State 307-08
Brooks v. Allison Division of General Motors 299-300
Brown & Williamson Tobacco Corp. v. F.T.C 961-62, 971
Brown v. Conrad 590
Brown v. Liberty Loan Corp. 230, 232, 235
Brown v. Terre Haute Regional Hospital 245-46, 423
Bunker v. National Gypsum Co. 636
Burks v. Rushmore 610-11, 616
Butler v. Williams 443

C

Campbell v. Greer 936
Campbell v. State 598
Carpetland U.S.A. v. Payne 201, 203-04, 207, 211-16, 218-19
Carter v. Review Board of Indiana Department of Employment & Training Services 451, 465
Celotex Corp. v. Catrett 277, 285
Center Management Corp. v. Bowman 497
Central Hudson Gas & Electric Corp. v. Public Service Commission 151, 153, 155, 156, 159-63, 165, 167, 705, 709-15, 720, 723, 725-28, 730
Chacharis v. Fadell 611
Chaplinsky v. New Hampshire 110, 119
Chase v. State 320-21

Childress v. Bowser 500
CIGNA-INA/Aetna v. Hagerman-Shambaugh 247, 251, 432-34
Cincinnati Gas & Electric Co. v. General Electric Co. 951, 963, 967-69, 971, 973-75
Community Hospital v. McKnight 910-11
Conn v. State 475-76
Cooter & Gell v. Hartmarx 294
Cornell Harbison Excavating, Inc. v. May 587-90
Corrugated Paper Products, Inc. v. Longview Fibre Co. 278
Covalt v. Carey-Canada, Inc. 633-34, 637-41
Cowe by Cowe v. Forum Group Associate 754-55, 760-61, 764-65, 769-71, 776
Coy v. Iowa 306-08
Crummey v. Commissioner 525
Curlender v. Bio-Science Laboratories 759-60, 768
Czarnecki v. Lear Siegler, Inc. 257

D

Dague v. Piper Aircraft Corp. 634-36, 638
Daymude v. State 393, 395
Dearborn Fabricating and Engineering Corp. v. Wickham 612-14, 616
Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc. 232
DelCostello v. International Brotherhood of Teamsters 743-46, 750
DeMichaeli & Associates v. Sanders 653
DeMoss Rexall Drugs v. Dobson 246, 248-51, 431-36
Despenza v. O'Leary 302
Detterline v. Bonaventura 918-20, 925
Diggs v. Lyons 931-32, 936-38, 943
Diggs v. State 324
Digital Equipment Corp. v. Emulex Corp. 190
Duckworth v. Egan 319

E

Ellis v. Smith 419
Endicott-Johnson Corp. v. Encyclopedia Press, Inc. 223, 229, 231-32, 239
Energy Supply, Inc. v. Indiana Department of Revenue 538
Erie Railway Comp. v. Tompkins 816
Estate of Mathes v. Ireland 922-24
Estate of Saemann v. Tucker Realty 485
Euler v. Euler 368-69
Evans v. Yankeetown Dock Corp. 460

F

F.W. Woolworth Co. v. Plaza North, Inc. 495
Faust v. Thomas 588-90, 593
Feitz v. Feitz 369
Felix v. Indiana Department of Revenue 549
Fields v. Cummins Employees Federal Credit Union 460, 466
Finberg v. Sullivan 231
Finley v. United States 273-76
First Federal Savings Bank v. Key Markets, Inc. 494-95
Flowers v. State 476
Fort Wayne Books, Inc. v. Indiana 111, 124-30, 133-35
Foy v. Greenblot 770
Franklin v. White 217
Freedman v. Maryland 113-16
Friedlander v. Troutman, Sanders, Lockerman, & Ashmore 738
Friedman v. Memorial Hospital of South Bend 391
Fuentes v. Shevin 225, 227-28, 232

G

G. Heileman Brewing Co. v. Joseph Oat Corp. 286-87
Garcia v. Gloor 887
Gardner v. Black 807
Garnett v. Kepner 934
General Electric Co. v. Drake 618, 622

Georgia Association of Retarded Citizens v. McDaniel 888
Ginzburg v. United States 123
Gleitman v. Cosgrove 758, 760
Globe Newspaper Co. v. Superior Court 959-60
Gnerlich v. Gnerlich 363-64, 366
Goka v. Bobbitt 284-86
Governmental Interinsurance Exchange v. Khayyata 591-93
Graham v. State 316-17, 427
Green Ridge Mining v. Indiana Unemployment Insurance Board 457, 466
Green v. Bock Laundry Machine Co. 262, 288-91, 928-29, 937, 939-41, 943-47
Gregg v. Sun Oil Co. 651
Guinn v. Light 416, 419
Gutierrez v. Municipal Court of S.E. Judicial District 887-88

H

H.H. Robertson Co. v. United Steel Deck, Inc. 192, 194
Hammock v. Bowen 891
Harbeson v. Parke-Davis 760
Harper v. Guarantee Auto Stores 594, 596
Hass v. Shrader's, Inc. 652-53
Hatchett v. State 323
Hazlett v. Sinclair 509
Hehr v. Review Board of Indiana Employment Security Division 456, 466
Hendrickson v. Binkley 377
Herman v. City of Chicago 277
Hermann v. Frey 614-15
Herrington v. Sonoma County 893-94
Hickman v. Taylor 247
Hicks v. State 323, 325
Hodge v. Nor-Cen, Inc. 501
Hoffman v. E.W. Bliss Co. 628-29, 632
Home Insurance Co. v. Neilsen 439-40
Howell v. State Farm Fire & Casualty Co. 241
Huff v. White Motor Corp. 623
Huffman v. Hains 271-73, 275-76
Hybritech, Inc. v. Abbot Laboratories 193-94

I

In re Brown 482
In re Cox 374
In re Data Access Securities Litigation 742-44, 746-51
In re Davis 287
In re Hudgins 473
In re Jones 472
In re Kimmel 473
In re Lewis 470-72
In re Marriage of Adams 366-67, 371
In re Marriage of Bickel 367
In re Marriage of Davidson 380, 383-84
In re Marriage of Gore 371-72
In re Oliver 472
In re Paternity of K.G. 482
In re Powell 474
In re R.M.J. 158
In re Rajan 481
In re Roche 472-73
In re Safran 473
In re Sheaffer 483
Indiana Civil Rights Commission v. Culver 458, 466
Indiana Civil Rights Commission v. Southern Indiana Gas & Electric Co. 463, 467
Indiana Construction Service, Inc. v. Amoco Oil Co. 243
Indiana Farmers Mutual Insurance Co. v. Graham 438
Indiana State Board of Tax Commissioners v. Fraternal Order of Eagles Lodge No. 255 546
Indiana State Highway Commission v. Morris 604-08, 616
Indiana Voluntary Fireman's Association v. Pearson 161
Infusaid Corp. v. Intermedics Infusaid, Inc. 667
Ingram v. Land-Air Transportation Company 650, 652

J

Jackson v. Johns-Manville Sales Corporation 775
Jackson v. Warrum 622-25
Jamison v. Texas 717, 719-20
Jarrel v. Monsanto Co. 625, 628, 632-33, 641
Jennings v. Jennings 253
Johnson v. St. Vincent Hospital, Inc. 904-08, 925
Jones v. Abriani 202-03
Jones v. Griffith 415, 429
Jones v. Marion County Small Claims Court 221, 223, 233-36, 239-40
Jordan v. Talaga 511-12
Jurado v. Eleven-Fifty Corp. 887-88

K

Kahn v. Cundiff 477, 479
Kaletha v. Bortz Elevator Co. 611
Kaminski v. Cooper 428
Keller Industries v. State Board of Tax Commissioners 546
Keller v. Indiana Department of Revenue 533-37, 539-40
Kennedy v. St. Joseph Memorial Hospital 393
Kingsley Books, Inc. v. Brown 113
Kinzli v. City of Santa Cruz 892-94
Kiracofe v. Reid Memorial Hospital 393

L

Lake Nacimiento Ranch v. San Luis Obispo County 893
Lamont v. Postmaster General 721, 723
Lenard v. Argento 930, 940
Locke v. State 315
Lord v. State 320

M

MacDonald, Sommer & Frates v. Yolo County 892
Madison v. State 317-18
Mansur v. Carpenter 905
Mareska v. State 323
Mars Steel Corp. v. Continental Bank, N.A. 262, 294-95, 300
Martinez Chavez v. State 325-26
Masterman v. Veldman's Equipment, Inc. 621-22, 624
Mathews v. Eldridge 228
Matsushita Electric Industrial Co. v. Zenith Radio Corp. 277, 282-83
Matter of Bryant 477
Maziarka v. St. Elizabeth Hospital 404-05
McClanahan v. Remington Freight Lines 446
Methodist Hospital v. Rioux 903, 914-17, 921
Meulen v. Review Board of Indiana Employment Security Division 448-49, 465
Mid-State Fertilizer v. Exchange National Bank 280-88
Midtown Community Mental Health Center v. Estate of Gahl 900-06, 910, 916-17, 919-25
Miller v. California 125, 127-28
Miller v. State (I) 305-08
Miller v. State (II) 305-06, 308-09
Minnick v. State 325-26
Minniefield v. State 321-22
Mitchell v. W.T. Grant Co. 226, 228, 231-32
Monroe Guaranty Insurance Co. v. Backstage, Inc. 442
Morgan v. Dalton Management Co. 498
Mullane v. Central Hanover Bank & Trust Co. 225
Murray v. Heckler 890

N

National Bellas Hess, Inc. v. Department of Revenue 570
National Geographic Society v. California Board of Equalization 570
National Private Trucking Association v. Indiana Department of Revenue 536
Near v. Minnesota 112-13, 117, 133
Nehi Beverage Co. v. Petri 481
Norco Construction, Inc. v. King County 892
Norris v. Wirtz 742

North Georgia Finishing, Inc. v. Di-Chem, Inc. 227-28, 232
Nylen v. Park Doral Apartments 490, 492

O

O'Dell v. State Farm Mutual Automobile Insurance Co. 645-47
O'Hara v. Kavens 737
O'Neil v. International Harvester Co. 218
O'Neil v. O'Neil 378
Ogle v. St. Johns Hickey Memorial Hospital 921-22, 924
Ohio ex rel. Ewing v. A Motion Picture "Without a Stitch" 115
Ohralik v. Ohio State Bar Association 155, 158
Omnisource Corp. v. Fortune Trading Co. 253
Overman v. Overman 384
Owen Equipment & Erection Co. v. Kroger 274-75

P

Park v. Chessin 759
Pavelic & Leflore v. Marvel Entertainment Group 297
Peavler v. Monroe County Board of Commissioners 596, 599-604, 606-07, 616
People v. Allen 933
Pepple v. Parkview Memorial Hospital, Inc. 392-93
Perkins Paving & Trucking, Inc. v. Indiana Department of Revenue 536
Phelps v. Sherwood Medical Industries, Inc. 631, 632
Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations 149, 710
Porter v. Porter 365, 369
Posadas de Puerto Rico Associates v. Tourism Co. 712
Press Enterprise Co. v. Superior Court 970
Procanik by Procanik v. Cillo 760, 768
Publicker Industries, Inc. v. Cohen 962

R

Randle v. LaSalle Telecommunications, Inc. 283-84
Reid v. Indianapolis Osteopathic Medical Hospital 399, 402, 405-06
Richmond Newspapers, Inc. v. Virginia 957-60, 962-63, 972
Riley v. National Federation of the Blind 145-46, 153, 155, 160-64, 166-67
Riverview Health Care v. Wright 647
Roberts v. Magnetic Metals Co. 743
Roche Products, Inc. v. Bolar Pharmaceutical Co. 189
Roggow v. Mineral Processing Corp. 593
Ronald Sappenfield v. Indiana 125, 131-32
Rong Yao Zhou v. Jennifer Mall Restaurant, Inc. 799, 801
Roper Corp. v. Litton Systems, Inc. 191
Rose v. Rose 369-70
Rowen v. Post Office Department 724-25
Rubsam v. Estate of Pressler 488
Rump v. Rump 385

S

Sanchez v. Hamara 646
Sandor Development Co. v. Reitmeyer 496
Schad v. Borough of Mount Ephraim 717-20
Schneider v. Irvington 717
Scripps Clinic and Research Foundation v. Genentech 179
Scruby, M.D. v. Waugh 918-20
Secretary of State of Maryland v. Joseph H. Munson Co. 147, 152-56, 160-61, 164, 166
Shanks v. A.F.E. Industries 631, 632
Sharp v. Indiana Union Mutual Insurance Co. 437-38
Shelby v. Truck & Bus Group Division of General Motors Corp. 644
Shelter Creek Development Corp. v. City of Oxnard 893

Shelton v. Tucker 712
Shoup v. Mladick 244, 421
Shows v. M/V Red Eagle 930-31, 933, 944
Sixberry v. Sixberry 376
Skendzel v. Marshall 492
Smith International, Inc. v. Hughes Tool Co. 190
Smith v. McFerron 256
Sniadach v. Family Finance Corp. 224-27, 230-31, 239
Snyder v. State 311-13
South Florida Art Theatres, Inc. v. Florida ex rel. Mounts 116
Southeastern Promotions, Ltd. v. Conrad 114-16
Sovern v. Sovern 367-68
Spearman v. Delco Remy Division of General Motors 445, 464
St. Mary's Medical Center of Evansville v. State of Indiana Board of Tax Commissioners 545
Standard Mutual Insurance Co. v. Bailey 436-38
Stanley v. Georgia 133
Stanley v. Review Board of Department of Employment & Training Services 452, 465
State Board of Tax Commissioners v. LeSea Broadcasting Corp. 606-07
State Department of Revenue v. Estate of Eberbach 547, 549
State Farm Fire & Casualty Co. v. Structo Division, King Seeley Thermos Co. 620-22
State v. Garcia 312
State v. Jorgensen 314
State v. Pease 314-15
Stolberg v. Stolberg 372
Sue Yee Lee v. Lafayette Home Hospital, Inc. 901-02, 908, 910-13, 925
Summit Club, Inc. v. Indiana Department of Revenue 540-41
Swoboda v. Brown 802
Szakaly v. Smith 507

T

Terre Haute Regional Hospital v. Badsen 407
Terry v. Ohio 312, 315
Texas Department of Community Affairs v. Burdine 459
Textile Mills Sec. Corp. v. Commissioner 883
Thiellen v. Graves 645-47
Thomas Dodge v. State Board of Tax Commissioners 546-47, 549
Thomas v. Collins 154
Thomas v. LeJeune Inc. 903
Tirmenstein v. Tirmenstein 367
Torres v. Oakland Scavenger Co. 300
Travel Craft, Inc. v. Wilhelm Mende GmbH & Co. 201, 203-04, 211, 214, 219
Turner v. District of Columbia 798, 801
Turpen v. Turpen 377-78
Turpin v. Sortini 760

U

United Mine Workers v. Gibbs 271, 274
United States v. Ayarza 694
United States v. Coleman 696-97
United States v. Galan 697
United States v. Huerta 691-92
United States v. Justice 689-90, 693-94
United States v. Leon 313-14
United States v. Mistretta 688
United States v. Musser 694-95
United States v. White 692
USAir, Inc. v. Indiana Department of Revenue 544
USS, A Division of USX Corp. v. Review Board of Indiana Employment Security Division 455, 466

V

Valentine v. Chrestensen 148, 150-51, 717
Vance v. Universal Amusement Co. 114-16
Varney v. Secretary of Health and Human Services 891
Video Tape Exchange Co-op v. Indiana Department of Revenue 537, 542-43
Village of Schaumburg v. Citizens

for a Better Environment 147, 152-54, 163-64, 166
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council 149, 151, 153, 159, 706, 708, 711, 714, 717
Voss v. Review Board Department of Employment & Training Services 449, 465

W

Waldron v. Wilson 255, 257
Walker v. Lawson 614-15
Walker v. Walker 373
Wallis v. Marshall County Commissioners 605-08, 616
Watson v. Medical Emergy Services 425-26, 428
Weaver v. American Oil Co. 210, 214, 216, 493
Weisman v. Hopf-Himsel, Inc. 242-43
Wells v. Auberry 538
West American Insurance Co. v. McGhee 440-41
Williams v. New York 682
Williams v. State 313, 758, 770
Wilson v. Garcia 738, 746
Wilson v. Riddle 590-91
Winder v. Review Board of Indiana Employment Security Division 453, 465
Winona Memorial Foundation v. Lomax 902-03, 913-17, 921, 925
Wixom v. Gledhill Road Machinery Co. 623
Wood v. Combustion Engineering, Inc. 735-36
Woodruff v. Clark County Farm Bureau Cooperative Association 202
Wright v. Brown 381

Y

Younger v. Dow Corning Corp. 630

Z

Zahn v. International Paper Co. 274-75
Zauderer v. Office of Disciplinary Counsel 164
Zayre Corp. v. S.M. & R. Co. 277
Zepeda v. Zepeda 757-58, 770